* Together with China Union Lines v. A. O. Andersen & Co. No. 933

Lan Jing-Chau v. A. O. Andersen No. 934

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NO. 927

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S. A., ET AL.,
*Petitioners,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Respondents*

## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Appeals for the Fifth Circuit**

On Behalf Of
MITSUBISHI INTERNATIONAL CORPORATION, ET AL.

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NO. _____

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S. A., ET AL.,
*Petitioners,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Respondents*

## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Appeals for the Fifth Circuit**

On Behalf Of
MITSUBISHI INTERNATIONAL CORPORATION, ET AL.

Petitioners, Mitsubishi International Corporation, et al. (hereinafter referred to as "these petitioners"), innocent owners of cargo on the Chinese Freighter UNION RELIANCE (hereinafter sometimes referred to as "the freighter"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 27, 1966, insofar, but only insofar, as said judgment affirms

a dismissal by the District Court of these petitioners' libel against the Norwegian Tanker BEREAN (hereinafter sometimes referred to as "the tanker") and her owner, A/S A. O. Andersen & Co., and holds that vessel and her owner free of fault and liability for the collision.

IN THIS IMPORTANT CASE THE FIFTH CIRCUIT, IN A RADICAL DEPARTURE FROM LONG-SETTLED RULES OF SAFETY AND WELL-DEFINED PRINCIPLES OF COLLISION LAW, AFFIRMED THE DISTRICT COURT IN HOLDING BLAMELESS AN OCEAN TANKER NAVIGATING UP THE NARROW HOUSTON SHIP CHANNEL ON A DARK NIGHT, WITH HER BOW TANKS FULL OF HIGHLY INFLAMMABLE AND TOXIC MATERIAL, AT FULL SPEED, WITHOUT A LOOKOUT OR ANCHOR WATCH. THE COURTS FURTHER HELD THAT THE TANKER NEED NOT IMMEDIATELY SOUND THE DANGER SIGNAL AND REVERSE ENGINES WHEN HER PILOT SAW AN APPROACHING FREIGHTER IN A POSITION FROM WHICH HE RECOGNIZED THAT SHE WAS LIKELY TO SHEER OUT OF CONTROL INTO THE TANKER'S WATERS, AND FROM WHICH POSITION SHE DID IN FACT SHEER OUT OF CONTROL INTO SAID WATERS. THE EFFECT OF THE DECISION, WHICH ALSO EXCUSED OTHER SERIOUS FAULTS ON THE PART OF THE TANKER, IS TO EXONERATE A VESSEL THAT WAS AWARE OF DANGER OF AN IMPENDING COLLISION, BUT CHOSE TO DO NOTHING WHATSOEVER TO AVERT IT! THE DISASTROUS COLLISION THAT FOLLOWED COST THE LIVES OF TWELVE MEN, SERIOUS INJURIES TO SEVERAL OTHERS, AND MORE THAN TWO

MILLION DOLLARS IN PROPERTY DAMAGE! IF SUCH CONDUCT IS TO BE CONDONED BY THE COURTS IN A SERIOUS COLLISION CASE SUCH AS THIS, THEN HENCEFORTH NO VESSEL NEED CONSIDER HERSELF BOUND BY THE RULES OF THE ROAD, "LAWFUL NAVIGATION" AND "SAFE NAVIGATION" WILL NO LONGER BE SYNONYMOUS, AND THE ENSUING HAVOC WILL RESULT IN IRREPARABLE DAMAGE TO THE MARINE COMMERCE OF THIS COUNTRY. WE DO NOT THINK THIS HONORABLE COURT WOULD KNOWINGLY PERMIT SUCH A RADICAL DEPARTURE FROM LONG-SETTLED PRINCIPLES OF PRUDENT NAVIGATION.

## CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals in this consolidated case is reported at 364 F.2d 769 and appears *infra* (together with the Order of said Court of October 7, 1966, denying petitions for rehearing) as Appendix B, p. 3a, et seq. The opinion of the United States District Court is reported at 222 F.Supp. 874 and is printed *infra* as Appendix C, p. 59a, et seq.

## JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was entered on July 27, 1966, and is set forth in the Opinion printed *infra* as Appendix B, p. 3a, et seq. Thereafter China Union Lines, Ltd., a petitioner under separate petition for certiorari in this consolidated cause, presented to the Court of Appeals a petition for rehearing, which was denied without further opinion on October 7, 1966 (See Appendix B, p. 58b). An order staying mandate of said Court on behalf of China Union Lines, Ltd., was

entered on October 11, 1966, staying the mandate for a period of ninety days from that date. An order staying mandate of said Court on behalf of Lan Jing-Chau, et al., was entered on October 17, 1966, staying the mandate for ninety days from that date.

Jurisdiction of this Honorable Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. Sec. 1254(1).

Jurisdiction of the United States District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, amended Act of May 24, 1949, c. 139, Section 79, 63 Stat. 101, 28 U.S.C.A. Sec. 1333(1).

## QUESTIONS PRESENTED

The United States Court of Appeals for the Fifth Circuit affirmed the District Court, exonerating a Norwegian tanker navigating up the Houston Ship Channel at night, with a cargo of highly inflammable and toxic material in her bow tanks, at full speed without a lookout and without an anchor watch in a meeting-situation collision with a Chinese freighter. The District Court found, and the Fifth Circuit sustained findings, that those aboard the tanker when about a mile away from the freighter saw the freighter so far to her starboard in a bend to the freighter's left that she appeared likely to sheer out of control across the narrow channel into the waters the tanker expected to occupy, and yet the tanker on so observing the freighter failed immediately to sound danger signals and reverse her engines. The courts found that on seeing the freighter in this condition, those aboard the tanker became "somewhat apprehensive" but continued on and sounded one blast of her whistle for a port to port passing

and turned right the amount required to make such passing without receiving a reply to her signal. During all of this time, and thereafter while the vessels closed to a distance of about a quarter of a mile, the freighter moved across the channel, exactly as those aboard the tanker had apprehended (although for a different reason), and collision occurred on the tanker's right hand side of the channel. The questions presented are:

1. Whether the tanker violated Rule III of Article 18 of the Inland Rules (33 U.S.C.A. § 203, Rule III) in failing immediately to sound danger signals and to reverse engines on observing the freighter in a position from which she was likely to sheer out of control across the channel into the waters the tanker expected to occupy.

2. Whether the tanker violated Rule I of Article 18 of the Inland Rules (33 U.S.C.A. § 203, Rule I) in sounding one blast and turning right an amount sufficient to make a port to port passing with the freighter without receiving an assent to her signal and at a time when those aboard her were "somewhat apprehensive" as found by the courts.

3. Whether the tanker's proceeding at full speed in the Houston Ship Channel at night with highly inflammable and toxic cargo in her bow tanks was a violation of 33 C.F.R. Sec. 207.180(e)(3)(ii) in spite of the evidence of custom relied on by the courts to exonerate the tanker from this charge.

4. Whether the tanker, on mere negative evidence that those aboard her did not hear a series of danger signals from the freighter, sustained her burden under the rule of *THE PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1874), to show that her failure to have a lookout not only probably

was not, but could not have been, a proximate cause of the collision.

5. Whether the tanker was at fault in failing to drop her starboard anchor in an effort to avoid the collision, as ordered by her pilot shortly after she sounded one blast and turned to her right.

6. Whether all of these faults taken singly or together constituted at the very least minor fault on the part of the tanker rendering her liable to petitioners as innocent owners of the freighter's cargo.

## STATUTES INVOLVED

The statutory provisions and regulation involved are:

(1) Rule III of Article 18 of the Inland Rules, 33 U.S. C.A. Sec. 203, Rule III.

(2) Rule I of Article 18 of the Inland Rules, 33 U.S. C.A. Sec. 203, Rule I.

(3) Article 29 of the Inland Rules, 33 U.S.C.A. Sec. 221.

(4) 33 C.F.R. Sec. 207.180(e)(3)(ii).

The above statutory provisions and regulation are set forth at length *infra* as Appendix A, p. 1a, et seq.

## STATEMENT OF CASE

At about 11:15 on the night of November 7, 1961, in the 400-foot wide Houston Ship Channel the Norwegian Tanker BEREAN, carrying a cargo of highly inflammable and toxic acrilonitrile in her bow tanks, collided violently in a meeting situation with the Chinese Freighter UNION RELIANCE. As an immediate result of the collision the tanker's bow tanks were ruptured; the acrilonitrile spewed

out, exploded and burned; and large quantities of the flaming liquid poured over the bow of the freighter, resulting in the deaths of her pilot and eleven of her crewmen and the severe burning of her master and others. The fire burned on for many days; the freighter became a total loss; and a substantial amount of these petitioners' cargo was destroyed or severely damaged by fire, water and exposure to the elements.[1]

Having been sued by the United States for the expense of removing the burning freighter from the channel and related expenses and fearing suits by the owners of other property lost or damaged in the collision, as well as by the injured persons and the personal representatives of the deceased, the owner of the freighter filed a petition for limitation of liability, which was ultimately consolidated for trial with various suits (including that of these petitioners) against the tanker and her owner for virtually the same damages.[2] Jurisdiction in the District Court was based on the Act of June 25, 1948, c. 646, 62 Stat. 931, amended Act of May 24, 1949, c. 139, Section 79, 63 Stat. 101, 28 U.S.C.A. Sec. 1333(1).

While the preponderance of the evidence at the trial overwhelmingly established serious, contributing faults on the part of the freighter and her owner, and clearly justified and indeed compelled findings of their liability, as well as denial of her owner's right to limit liability,[3] there was also a substantial amount of evidence pointing to and requiring findings of fault and liability on the part of the

1. See District Court's Opinion in Appendix C, p. 59a.

2. See District Court's Opinion in Appendix C, pp. 59a-62a.

3. See District Court's Findings of Fact 2, 3, 4, 7, 9, 28, 29, 30, 31, 32, 33, 34 and 35 appearing at pp. 63a-79a in Appendix C and the Circuit Court's Opinion at pp. 33a-36a in Appendix B.

tanker and her owner. This latter evidence, whether by reason of a sense of the more serious character of the faults of the freighter and her owner or for other reasons not clearly apparent, the courts below chose either to rationalize away or to ignore, although including in the fact findings matters requiring legal conclusions of fault and liability on the part of the tanker.[4] It is this latter action on the part of the lower courts that causes these petitioners to seek the writ of certiorari.

The facts forming the basis for the more serious charges of fault on the part of the tanker may be briefly summarized from the findings of the lower courts in effect as follows. Those on the tanker, when about a mile away from the freighter and traveling at full speed in this very narrow channel without a lookout or anchor watch of any kind, sighted the meeting freighter in a 15° bend in the channel to the freighter's left and the tanker's right. The freighter was then so far over to her own right hand side of the channel in the bend that the pilot on the tanker saw that the freighter was likely to sheer out of control from such position across the channel into the waters occupied and intended to be occupied by the tanker.[5]

On seeing the freighter so positioned in the channel, those on the tanker remarked about the unusual and dangerous position of the freighter[6] (and thereafter made log

4. See District Court's Findings of Fact 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 36, 37, 38 and 39 appearing at pp. 68a-80a in Appendix C and the Circuit Court's Opinion at pp. 15a-27a in Appendix B.

5. For the crucial testimony of Pilot Charles C. Lary, Jr., of the BEREAN on this point please see Appendix D at pp. 86a-96a hereof.

6. See District Court's Finding of Fact 23 at pp. 72a-73a of Appendix C and Pilot Charles C. Lary's testimony at pages 87a and 90a of Appendix D.

entries[7] describing such position) and in the words of the courts below, became "somewhat apprehensive."[8] However, the tanker failed immediately to sound the danger signal and reverse her engines, as required by Rule III of Article 18 of the Inland Rules of the Road, 33 U.S.C.A. Sec. 203, Rule III, and the authorities construing said rule. Instead, those on the tanker (in clear violation of Rule I of Article 18 of the Inland Rules of the Road, 33 U.S.C.A. Sec. 203, Rule I, and the authorities construing said rule) sounded one blast, requesting a port-to-port passing, and, before receiving any reply to such signal, turned to her right in the channel an amount sufficient to make such a passing.[9]

During the next minute and a fraction, by her own evidence, the tanker traveled about 1400 feet up the channel toward collision with the freighter,[10] which had in the interim, as anticipated by the tanker (although for a different reason), completed her sheer across the channel into the tanker's waters.[11] During this same period of time, according to the courts' findings, the freighter had reversed engines, dropped her starboard anchor (with 600 feet of chain)[12] and dropped her port anchor, all in an effort to stop before collision.[13]

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7. See testimony of the tanker's master as to her log entries on this point (R. 3490 and 3495).

8. See the District Court's Finding of Fact 23 at pp. 72a-73a of Appendix C and the Circuit Court's Opinion at pages 16a and 19a of Appendix B.

9. See the District Court's Finding of Fact 23 at pp. 72a-73a of Appendix C and R. 3591 and the Circuit Court's Opinion at pages 16a and 19a of Appendix B.

10. See pp. 92a-93a of Appendix D (R. 3591-3592).

11. See the District Court's Findings of Fact 19, 20, 21, 22 and 23 at pp. 71a-73a of Appendix C.

12. See R. 1429 ff. regarding location of anchors.

13. See the District Court's Findings of Fact 19, 20 and 21 on p. 71a of Appendix C.

According to the overwhelming weight of the evidence, during this same period and for some time preceding it, those on the freighter had been sounding a long, loud series of danger signals to the tanker to warn her of the steering casualty which actually caused the freighter to sheer.[14] However, the District Court found (on mere negative evidence from the "lookoutless" tanker that such signals were not heard on her noisy bridge 350 feet aft of her bow) that such signals were not sounded. (Anomalously, though finding that danger signals were not sounded by the freighter, the courts below, without discussing the point, permitted a full recovery of damages for her husband's death by the widow of the freighter's pilot, the person on the freighter clearly chargeable with the duty to sound such signals and the consequences of failure to sound them, if they in fact were not sounded.)

Although the pilot of the tanker, about two minutes before the collision, ordered her starboard anchor dropped for the purpose of slowing her speed and helping to prevent the collision, her second officer chose not to drop same and same was never dropped.[15] The courts below were persuaded to excuse and did excuse (on the basis of evidence of a negligent custom not to keep an anchor watch in the channel) the tanker from this additional fault on her part.

The District Court, in spite of all of the foregoing, exonerated the tanker and her owner, and the Fifth Circuit affirmed, resulting in a dismissal of the libel of these petitioners (innocent owners of cargo on the freighter) against the tanker and her owner.

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14. For some of this great mass of evidence, please see R. 1533, 1534-1535, 1536, 1596, 1677-1681, 1710, 1913, 1917-1918, 2009, 2200-2201, 2589, 2593-2595, 2624-2625 and 2640.

15. See Fact Finding 25 of the District Court on pp. 73a-74a of Appendix C.

## REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. The decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with long-settled principles enunciated by the Supreme Court of the United States, if not with direct holdings of said Court, and the same is true with respect to principles and decisions of the United States Courts of Appeals for the Second, Third, Fourth and Sixth Circuits, to say nothing of the same type of conflict with previous principles and decisions of the Fifth Circuit.

2. The decision concerns extremely important questions in construction of the Inland (navigational) Rules of the Road and as such bears on the safe navigation of all vessels in the Inland Waters of the United States and the prevention of collisions thereof.

3. The decision is contrary to well-settled principles of maritime law and reaches an erroneous result.

### 1. *Conflict*

In the case of *The New York*, 175 U.S. 187 (1899), Mr. Justice Brown enunciated the following principles then and now well-settled in maritime law at pages 201 and 207 of the report:

> "Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, *or whose position or movements are uncertain*, she is bound to stop until her course be ascertained with certainty . . .

> "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." (Emphasis added.)

The foregoing principles were partially codified in the language of Rule III of Article 18 of the Inland Rules, 33 U.S.C.A. Sec. 203, Rule III, quoted in Appendix A hereof, page 1a, infra. The precise language of the rule required the tanker in this case to sound the danger signal *immediately* upon experiencing doubt regarding the freighter. Such doubt was experienced at the time the freighter was seen in the bend in a position likely to sheer across the channel. According to the authorities construing Rule III of Article 18, the tanker also had the duty *immediately* to *stop and reverse her engines.* Had she done so, it is clear that the collision would have been completely avoided as stopping even 200 feet below the point of collision would have prevented the tanker from colliding with the freighter.

We respectfully submit that there can be no doubt that the movements of a vessel about to sheer are uncertain. When the other vessel is proceeding up a narrow channel at a speed of from 13 to 14 knots, with highly explosive cargo forward, as was the tanker in this case, and a meeting vessel appears about to sheer, there is then "uncertainty" and "anticipated danger" of the gravest character.

If any authority for the above propositions in addition to the literal language of the rule and the principles enunciated in *The New York*, supra, are required, same may be found in the following decisions from the other Circuits, with all of which the instant case conflicts in prin-

ciple, and with most of which it conflicts in specific holding:

(1) *The MUNAIRES*, 1 F.2d 13, 15 (2d Cir. 1924);
(2) *The CITY OF CHESTER*, 78 Fed. 186 (4th Cir. 1897);
(3) *The C. R. HOYT*, 136 Fed. 671 (D.C. N.J. 1905);
(4) *The E. J. BERWIND*, 74 F.2d 705 (2d Cir. 1935);
(5) *Tide Water Associated Oil Co. v. The SYOSSET, et al.*, 203 F.2d 264 (3d Cir. 1953);
(6) *Tank Barge Hygrade, Inc. v. The GATCO NEW JERSEY*, 250 F.2d 485 (3d Cir. 1957); and
(7) *Federal Insurance Company v. SS ROYALTON, etc.*, 312 F.2d 671, 676 (6th Cir. 1963).

Please see also the treatise *Griffin on Collision*, Section 256(f) and cases there cited.

For a recent case by the Fourth Circuit to similar effect, please see *Esso Standard Oil Company v. Tug MALUCO I*, 332 F.2d 211 (4th Cir. 1964).

The many Fifth Circuit decisions to similar effect are exemplified by the case of *Parker Bros. & Company v. De-Forest*, 221 F.2d 377 (5th Cir. 1955).

It is quite apparent from a consideration of the language of the District Court's opinion and that of the Circuit Court in the instant case that confusion arose in both courts as to what set of operative facts brings on the obligations of Rule III, both courts apparently being under the impression that there was no duty to act under Rule III until it is known that collision is "imminent" or that an "emergency" exists. See language of the District Court (R. 5127-5129) appearing at pages 71a-73a of Appendix C hereof and language of the Circuit Court appearing on pages 15a and 19a of Appendix B hereof. In any event,

the pilot of the tanker knew early that there was danger. See Appendix D hereof, an important excerpt (from R. 3544-3545, 3546-3547, 3548-3549, 3587-3591 and 3592-3595) from his testimony relied on by the lower courts in this connection.

It is clear from the above-cited cases and from *The New York* opinion of this Honorable Court, supra, that it is "danger of collision" or "risk of collision" that brings on the obligations of Rule III, rather than recognition of an "emergency" or "imminence" of collision. "Danger or risk of collision" has been defined by Judge Addison Brown in classical language in the case of *The AURANIA* 29 Fed. 98, 123 (S.D.N.Y. 1886) as follows: *"there is danger or risk of collision whenever it is not clearly safe to go on."* (Emphasis added.) This doctrine has been followed in many subsequent cases. For a recent case to similar effect please see *Ocean Marine, Ltd. v. United States Lines Company,* 300 F.2d 496, 498-99 (2d Cir. 1962).

We respectfully submit that the misapplication and resulting dilution of Rule III by the Courts below are alone sufficient to call for a review on a writ of certiorari.

In the case of *Construction Aggregates Co. v. Long Island R. R. (The SANDMASTER),* 105 F.2d 1009 (2d Cir. 1939), Judge Learned Hand (in strict accordance with the literal language of Rule I of Article 18 of the Inland Rules (33 U.S.C.A. Sec. 203, Rule I)) held at page 1012 of the report as follows:

> "Rule I also provides that when the positions are 'head and head', the signals shall be exchanged 'and thereupon such vessels shall pass on the port side of each other.' *In cases where any change of helm is necessary, this presupposes that the rudder shall not be moved until assent has been secured.* This is well-

> settled, when the proposal is for a starboard passing. * * * It applies a fortiori to a port to port passing, because some helm action is always then necessary before the vessels can 'pass'. The phrase 'and thereupon', indicates that they shall only put themselves in passing position after the exchange." (Emphasis added.)

To the same effect are the cases of *The RICHARD J. BARNES*, 111 F.2d 294 (2d Cir. 1940) and *James McWilliams Blue Line, Inc. v. Card Towing Line, Inc.*, 168 F.2d 720 (2d Cir. 1948).

The decisions by the courts below are in direct conflict with the holding in the *Construction Aggregates Co. (SANDMASTER)* case, supra, and we respectfully submit that this Honorable Court should declare the law on this point so that the circuits will not be in conflict. It is obvious from the facts as found by both the District Court and the Circuit Court that the tanker, at a time when those aboard her were uncertain that such a passing could be safely made, sounded one blast and turned right the amount sufficient to make a port-to-port passing without having received an assent to such a passing. The tanker did not carry the burden of showing that the above clear statutory violation could not possibly have contributed to the collision, as required by the holding in *The PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1874). It is quite apparent from the facts that the freighter was well over on her port side of the channel at the time of the collision, and there was space available to her starboard, which the tanker could possibly have used but for the fact that she had previously changed course to her right in violation of the above rule.

The Circuit Court below cited the case of *Royal Navy of Italy v. Standard Oil Co. of N. J.*, 27 F.2d 331 (5th

Cir. 1928), as authority for the proposition that a judicially-recognized custom in the Houston Ship Channel excused any violation of Rule I of Article 18 and required a port-to-port passing on the part of meeting vessels. However, an examination of this latter decision shows clearly that nothing in the custom or in the cited decision excused the vessels from first exchanging signals before either vessel moved her helm. In fact, the court in the *Royal Navy of Italy* case clearly states that the signals had been exchanged in that case. Any other requirement would be, we respectfully submit, in the teeth of the language of Rule I of Article 18.

The decision below cannot properly be distinguished from the above authorities, and, therefore, this Honorable Court should grant the writ of certiorari to resolve these conflicts and to restore these rules to their full strength for the prevention of collisions, not for the encouragement thereof.

### 2. *Importance*

A careful reading of the decisions of the courts below shows that both courts were greatly impressed (and rightly so) with the unseaworthiness of the Chinese freighter and the gross negligence of her owner and as a consequence likely were persuaded to ignore serious navigational faults of the Norwegian tanker. In excusing the tanker from the violation of Rule III of Article 18 of the Inland Rules and from the violation of Rule I of Article 18, the courts below have permitted a hard case to result in bad law. Safety principles developed by this Honorable Court over a long period of time and consistently followed by all of the circuits, including the Fifth Circuit prior to the instant case, are in jeopardy by reason of the laxity condoned in the instant case.

Furthermore, the lower courts in the instant case have excused the tanker for proceeding at night in the narrow Houston Ship Channel at full speed loaded with toxic and inflammable cargo without a lookout or an anchor watch on mere evidence of custom. In order to prevent future collisions of this character and magnitude, it is extremely important for this Honorable Court once again to declare the heretofore well-settled principle that evidence of a negligent custom is no excuse for conduct in accordance with the custom. See such cases as *A. H. Bull S.S. Co. v. Chesapeake S.S. Co. of Baltimore City,* 101 F.2d 599, 601 (4th Cir. 1939), where the Court, quoting in part from the opinion of the Fourth Circuit in *The Acilia,* 120 Fed. 455, 458 (4th Cir. 1903), said:

> ". . . 'Full speed in these dredged channels, when about to pass other vessels, is undeniably a fault which increases every risk of navigation. Appleby v. The Kate Irving (D.C.), 2 F. (919), 924.'
>
> "While, as stated by the judge below, it seemed to be the custom to violate this rule yet the fact that the rule was more honored in the breach than by observance does not justify its violation. Custom no matter how long persisted in cannot make dangerous procedure safe."

In addition to the foregoing, the lower courts excused the tanker for a failure to have any lookout, on a showing that it was *customary* on the vessel to excuse the lookout for a period of 10 minutes or so at the beginning of every hour so that the lookout might obtain coffee. This negligent practice should be condemned by this Honorable Court, particularly where as here the overwhelming weight of the evidence shows that a series of danger signals were blown by the freighter several minutes before the collision

and were not heard by those on the tanker. The courts below, to sustain this negligent practice, relied on mere negative evidence from persons on the noisy bridge of the tanker that the signals were not heard, to serve as a basis for a finding that they were not sounded. (On the other hand, the lower courts virtually admit the incorrectness of such a finding by granting a full recovery to the widow of the freighter's pilot, who was the person primarily, if not solely, responsible for failure to sound the danger signals, if they were not in fact sounded.) This Honorable Court should condemn this use of negative evidence, particularly where there was no one properly positioned to hear the signals, to excuse the negligent practice of failing to keep a proper lookout. This matter is of most serious importance for the safety of vessels under the following among other decisions of this Honorable Court:

(1) *Chamberlain v. Ward*, 62 U.S. (21 How.) 548, 570 (1859);
(2) *The ARIADNE*, 80 U.S. (13 Wall.) 475, 478 (1872); and
(3) *The OREGON*, 158 U.S. 186, 193 (1895).

It is also extremely important that this Honorable Court take direct issue with the lower courts in their holdings to the effect that an anchor watch need not be maintained in a narrow channel and that an anchor not only need not be used, but probably would be of no assistance, in stopping a vessel to prevent a collision. Such a holding certainly discourages a practice well-settled in law as a clear duty of a vessel to prevent a collision. See the cases of *The VIRGINIA*, 25 F.2d 623 (2d Cir. 1928), cert. denied, 278 U.S. 610; *River Terminals Corp. v.*

*United States*, 121 F.Supp. 98 (E. D. La. 1954); *Maribianca Navegacion, S.A. v. Panama Canal Company*, 182 F.Supp. 369 (D. Canal Zone 1956), affirmed, 298 F.2d 729 (5th Cir. 1962); and *Navegacion Castro Riva v. The M. S. NORDHOLM*, 178 F.Supp. 736 (E. D. La. 1959), affirmed, per curiam 287 F.2d 398 (5th Cir. 1961).

With the many navigational faults of the tanker in this case all being excused by the courts below, if the decisions below are permitted to stand, careless navigation will be encouraged and the Rules of the Road emasculated. This Honorable Court should grant certiorari to hold the tanker and her owner at fault and liable and thus maintain the applicable Rules of the Road in full force and effect to prevent collisions, as they were designed to do.

### 3. *Error in Decision Below*

As set forth above, the courts below both erred in interpreting the requirements of Rule III of Article 18 of the Inland Rules, 33 U.S.C.A. Sec. 203, Rule III, and of Rule I of Article 18 of the Inland Rules, 33 U.S.C.A. Sec. 203, Rule I. These matters will not be reiterated here, except to point out that the decisions below are clearly in error in their construction of the rules and in their holdings on the facts as found by them.

The following authorities show that the lower courts were also in error in excusing the negligent custom of proceeding at full speed in the narrow Houston Ship Channel at night:

(1) *United States v. Tank Vessel NORTH DAKOTA, etc.*, 208 F.Supp. 904, 906-07 (S.D. N.Y. 1962);

(2) *The Paris*, 37 F.2d 734 (S.D. N.Y. 1930), aff'd, per curiam on the District Court's opinion, 44 F.2d 1018 (2d Cir. 1930);

(3) *The George H. Jones,* 27 F.2d 665 (2d Cir. 1928), cert. denied, 278 U.S. 649;

(4) *Interlake S.S. Co. v. Great Lakes Transit Corporation,* 89 F.2d 694 (2d Cir. 1937), cert. denied, 302 U.S. 706;

(5) *Morrow S.S. Co. v. The Daniel J. Morrell, et al.,* 90 F.Supp. 300 (E.D. Mich. 1949), aff'd, per curiam, 182 F.2d 347 (6th Cir. 1950);

(6) *A. H. Bull S.S. Co. v. Chesapeake S.S. Co.,* 101 F. 2d 599 (4th Cir. 1939), rehearing denied;

(7) *Appelby v. Bark Kate Irving,* 2 Fed. 919 (D. Md. 1880);

(8) *W. E. Hedger Transportation Corporation v. Hart,* 163 F.2d 90 (2d Cir. 1947);

(9) *The San Simeon,* 63 F.2d 798 (2d Cir. 1933), cert. denied, 290 U.S. 643; and

(10) *Griffin on Collision,* Section 255.

Applicable here also is the following U. S. Engineers' regulation quoted in Appendix A, p. 2a hereof: 33 C.F.R. § 207.180(e)(3)(ii). Under all of the evidence and the above authorities, we respectfully submit that the great speed of the tanker was negligence and a proximate cause of the collision, and the courts below erred in not so holding.

For recent cases showing the serious error committed by the courts below in excusing the tanker for her failure to keep any lookout please see:

(1) *Circle Line Sightseeing Yachts, Inc. v. City of New York,* 283 F.2d 811, 814-15 (2d Cir. 1960);

(2) *Esso Standard Oil Company v. Oil Screw Tug MALUCO I,* 332 F.2d 211, 213-14 (4th Cir. 1964);

(Note: Please also see holding of this case regarding violation of Rule III of Article 18 on pp. 215-216 of 332 F.2d)

(3) *Gulf Oil Corporation v. The SOCONY NO. 16, et al.*, 162 F.2d 869 (2d Cir. 1947); and

(4) *Dwyer Oil Transport Co., Inc. v. Tug EDNA M. MATTON*, 255 F.2d 380 (2d Cir. 1958).

The cases showing the lower court's error on the anchor question appear under "2. Importance" above and will not be repeated here.

To assist admiralty courts in dealing with a situation where as here one vessel (the freighter) was unseaworthy and her owner grossly negligent and the faults of the other vessel (the tanker) may appear to have been less gross, this Honorable Court long ago created the doctrine of Major-Minor Fault. The tanker should at the very least be held liable under this doctrine to these petitioners as *innocent* owners of the freighter's cargo, and the lower courts most certainly erred in their failure so to hold. Please see the following cases:

(1) *The Michael Tracy (Cape Cod-Michael Tracy)*, 43 F.2d 965 (2d Cir. 1930), cert. denied, 282 U.S. 895;

(2) *O/Y Finlayson-Forssa A/B v. Pan Atlantic S.S. Corp.*, 259 F.2d 11, 19 and n. 19 (5th Cir. 1958);

(3) *The Modemi*, 58 F.2d 916 (5th Cir. 1932);

(4) *Sir William Reardon Smith & Sons, Ltd. v. The Tug SAN PEDRO*, 226 F.Supp. 879 (S.D. Tex. 1962), affirmed, 328 F.2d 623 (5th Cir. 1964).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 29, 1966.

Respectfully submitted,

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# APPENDIX A

## STATUTES INVOLVED

The statutory provisions and regulation involved are:

(1) Rule III of Article 18 of the Inland Rules, 33 U.S.C.A., Sec. 203, Rule III, which reads as follows:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, for any cause, the vessel so in doubt shall *immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (Emphasis added.)

(2) Rule I of Article 18 of the Inland Rules, 33 U.S.C.A., Sec. 203, Rule I, which reads as follows:

> "When steam vessels are approaching each other head to head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and *thereupon* such vessels shall pass on the port side of each other." (Emphasis added.)

(3) Article 29 of the Inland Rules, 33 U.S.C.A., Sec. 221, which reads as follows:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of *any neglect to keep a proper lookout*, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (Emphasis added.) and

(4) 33 C.F.R., Sec 207.180(e)(3)(ii), which reads as follows:

> "A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up, . . . or any other manner of structure or improvements likely to be damaged by collision, suction or wave action."

## APPENDIX B

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 21367

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CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S.A., ET AL.,

Appellants,

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,

Appellees.

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*Appeal from the United States District Court for the Southern District of Texas.*

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(July 27, 1966.)

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Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

KILKENNY, District Judge: This is the story of another maritime tragedy resulting in heavy loss of life, severe personal injuries and property damage.

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* Of the District Court of Oregon, sitting by designation.

On November 7, 1961, about 11:00 P.M. the Chinese Ship M/V UNION RELIANCE (RELIANCE), was proceeding outbound, and the Norwegian Ship M/V BEREAN (BEREAN), which was inbound, collided on the east side of the Houston Ship Channel (Channel). The night was clear, the visibility good, with a northerly wind of approximately eight miles per hour. The ships caught fire, the fire aboard the BEREAN was extinguished within a matter of hours, while the RELIANCE remained ablaze, blocking the channel until November 10th when it was towed to and anchored in Galveston Harbor by the United States Corps of Engineers.

## THE LITIGATION

After the towage, the United States filed a libel *in rem* against the RELIANCE, seeking the immediate sale of the vessel, the recovery of expenses incurred in removing the vessel from the Channel and in safe-guarding her while at anchorage. China Union Lines, Ltd. (China Union), owner of the RELIANCE, filed a petition for exoneration, or limitation of liability, and obtained the customary order prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding. In the petition, China Union elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. The court appointed a salvage master and authorized him to undertake the steps necessary to extinguish the fire in the vessel's holds and bring her to port to discharge the remaining cargo, preparatory to sale.

In other proceedings, in the same court, China Union filed its libel against the BEREAN. A. O. Andersen & Co. (Andersen), the owner of BEREAN, appeared, claimed the vessel and answered in cross-libel against China Union.

Mitsubishi International Corporation, et al, (Mitsubishi), the owners and underwriters of the lost and damaged cargo aboard the RELIANCE, filed a libel against BEREAN and her owner. Likewise, American Cyanamid Company (Cyanamid), the owner of the only cargo lost aboard the BEREAN filed its libel against the RELIANCE. The Consul General of the Republic of China (Consul General), sought recovery for the injuries to, and deaths of, the officers and members of the crew (Lan Jing-Chau) of the RELIANCE against both vessels. Lucy Duncan (Duncan), as widow, executrix and sole beneficiary of Captain Duncan, channel pilot, also killed as a result of the collision, sought recovery against RELIANCE and her owners.

Separate libels were filed directly against Cyanamid, as owner of the BEREAN cargo, by China Union; the owners and underwriters of the cargo aboard the RELIANCE, and various other parties. These libels were filed on the theory that the acrylonitrile carried by the BEREAN, was of such a dangerous nature and propensity as to render the shipowner liable to said parties.

This complexity of libels, with its jungle of issues, was wisely consolidated by the trial judge (judge). Prior to trial, and after hearing, the judge directed payment of certain salvage claims and deferred action on the remainder of such claims pending a decision on the issues of liability.

After trial, and the entry of detailed findings and conclusions, the judge entered an interlocutory decree directing, among other things, that:

(1) the petition of China Union for exoneration from, or limitation of, liability be denied;

(2) reimbursement be made to the trustee, out of

funds in the Registry of the Court, for the trustee's reasonable expenses, including trustee and attorney fees;

(3) payment be made of the claim of the United States from funds remaining in the Registry of the Court in the sum of $27,219.38, with interest;

(4) China Union recover nothing from the cargo of the RELIANCE as general average;

(5) the order theretofore entered enjoining prosecution of litigation against China Union on any claim growing out of the collision be vacated;

(6) China Union recover nothing against respondent Andersen or the BEREAN, that its libel be dismissed with costs and that Andersen, as cross-libelant, recover from RELIANCE and cross-respondent, China Union the damages sustained by it in consequence of the casualty;

(7) Mitsubishi, and other such libelants, the owners of parcels of cargo on the RELIANCE, recover nothing against the BEREAN or her owner Andersen or Cyanamid, and that such libel be dismissed with costs;

(8) Cyanamid recover from the RELIANCE and her owner China Union the damages sustained in consequence of the casualty, and that the cross-libel by China Union against Cyanamid be dismissed with costs, together with any other intervening libels or cross-libels against that company be dismissed;

(9) the Consul General, representing the next of kin of the dead Chinese seamen and those that were injured, recover nothing against BEREAN or Andersen and that the libel be dismissed;

(10) the representative of the deceased and injured crewmen recover from the RELIANCE and her owner

China Union, all damages sustained by each of them, less one 15% reduction for contributory fault.

(11) Lucy Duncan, the surviving wife of Captain D. O. Duncan, recover from the RELIANCE and her owner China Union, such damages as sustained by reason of the death of her husband.

(12) Armement Deppe, owner of the SS LUXEMBOURG, recover nothing from the BEREAN or her owners Andersen & Co.

China, Mitsubishi, the Consul General of the Republic of China, and Armement Deppe, S.A. appeal

## FINDINGS

The detailed findings and conclusions of the judge occupy twenty-five pages of the record. Putting aside certain background material and formalities of no particular significance on this appeal, the judge, after a trial of approximately one month, found that the following facts, with others to be later discussed, were supported by substantial evidence.

## THE VESSELS

The RELIANCE was a steel motor ship, built in the United States in 1940, approximately 496 feet in length and designed for the carriage of dry cargo. The ship's engines were designed to give approximately 240 revolutions per minute which, with the existing gear ratio should give approximately 80 revolutions per minute to the shaft. However, by reason of age, wear and poor maintenance, the engines were not capable of producing this efficiency. To change the direction in which the power is imparted to the propeller shaft, it was necessary to stop the engines by

cutting off the fuel supply, then change the cam setting and restart the engines. The design permitted and, for that matter, contemplated one pair of engines to be kept running ahead and the other pair to be kept running astern at all times while the vessel was in pilot waters. When desirable all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was neither a difficult nor a time consuming operation and could be accomplished by competent engine room personnel in a matter of approximately one minute. She was equipped with a hydraulic steering system, located in the steering engine room, not in the main engine room. Hydraulic rams, equipped with fluid under great pressure, actuated the rams and served to move the rudder in the desired direction. Two separate steering systems were available to force the fluid through the system and against the rams, while one was in use the other served as a stand-by. The principal unit of the steering system was a large pump powered by an electric pump utilizing a 50 h.p. electric motor. A number of auxiliary pumps and motors were available, but only a so-called "replenishing" pump was of any importance. In normal operation the hydraulic fluid escaped from the system and was collected in the sump tank, then lifted by means of the "replenishing" pump to an overhead replenishing tank from which, by gravity, it was fed back into the system for further use. This pump was powered by a small electric motor. Approximately 35 gallons of fluid was required to fill each system. While minor leaks were expected, in normal operation only small quantities of fluid should be required at quite infrequent intervals.

The BEREAN was built in Norway and delivered to her owner in April, 1961. She was 508 feet in length,

powered by one 9000 h.p. diesel engine. Her navigating bridge is in the forward part of the afterhouse, some 350 feet from the bow. Her cargo space is divided into 42 tanks, designed and equipped to carry many varieties of bulk liquids. She had been engaged in the chemical trade for several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The skin of the ship constituted the outer wall of certain of her wing tanks. These tanks were not protected by cofferdams or other protective voids.

## CARGOES AND MOVEMENTS PRECEDING THE CASUALTY

Following her purchase in April, 1961, from Greek interests, the RELIANCE sailed from Greece, through the Mediterranean to Tampa, Florida, and thence to New Orleans. There, her captain and crew had full knowledge of the fact that extensive repairs were needed in the engine room, in particular the overhaul of the engine control department. An officer of the petitioner and a marine surveyor flew from New York to New Orleans to supervise these repairs. While those repairs were underway, the main engines were opened and found badly worn and eroded. Since repairs were not readily available the old heads were re-installed. A full report was made to the owners of the work and other work which was recommended by the marine surveyor to place the engine room in proper condition. Departing New Orleans the RELIANCE proceeded to Houston, thence through the Panama Canal, thence to Japan and Taiwan, where additional engine repairs were made. There, her captain, chief engineers and others of her crew were replaced and the officers and crew who were

aboard at the time of the casualty took over. She discharged a part of her cargo at Los Angeles and there received five of the number of piston heads that were needed to properly repair her main engines. However, the heads were not installed. She arrived in Houston on November 5th, discharged part of her cargo and left the Houston dock at 6:30 P.M. November 7th. Unassisted by tugs, she proceeded outbound, with Channel pilot Duncan at her bridge. At approximately 8:30 P.M. while she was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system, which was in use at the time. The engines were stopped, the anchors were dropped and the vessel brought to rest. Both the starboard and port steering systems were disconnected. After a test had shown that the port system was operating properly, the anchors were lifted and the vessel got underway at approximately 9:00 P.M. Her crew then attempted to repair the starboard steering system. On examination, it was found that the brushholder on the electric motor which operated the starboard steering pump was out of order. The chief electrician repaired the damaged part, but did not replace the part in the engine. As a result, the starboard steering system was not thereafter in operation. Apparently the port steering system was functioning properly until she started across the channel.

On November 6, 1961, the BEREAN loaded 1400 tons of acrylonitrile in Good Hope, Louisiana. The officers of the vessel directed that the cargo be placed in the forward most cargo tanks. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. A distinguishing feature is that it gives off highly toxic fumes. The fumes, in relatively weak concentrations, will cause illness to a person exposed over a long period of time. A single exposure may

cause illness or death if there is a sufficiently high concentration of the material. The symptoms of poisoning are similar to those of cyanide. Under Coast Guard Regulations (Regulations) acrylonitrile was, at the time of the casualty, and still is, classified under Regulations as a Grade C flammable fluid, as is gasoline, benzine, naphtha and other such products. The BEREAN also carried a mixed cargo of other bulk liquids. She arrived at Galveston Bar at approximately 9:15 P.M. on November 7th. Channel pilot Lary boarded her and assumed active control of her navigation as she proceeded inbound toward Houston.

From the sea buoy to the point of collision, and beyond, the channel passes through the open waters of Galveston Bay. The channel was dredged to a depth of 36 feet and a width of 400 feet, and is relatively straight as it crosses the Bay. It was the custom and practice of most vessels, in favorable weather, to navigate this portion of the channel at "full ahead," except when passing other ships. From the sea buoy to the point of collision, pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a major portion of the time, although he was in his cabin before the emergency. He returned to his bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour. It was his duty to proceed to the bow of the ship to serve as a lookout for another hour, before returning to duty at the wheel. However, when weather and visibility were good and the vessel was proceeding routinely, it was the custom and practice for the helmsman to have a 10 to 15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose. Normally, in passing through the area being navigated by the BEREAN, it was not customary to have an anchor

watch standing by, in that there was no occasion to use an anchor to maneuver until after reaching Morgan's Point, some distance inward.

## THE COLLISION

The RELIANCE was navigating at a speed of 9-10 knots over the ground, when she made the bend at Five Mile Point. Each vessel saw the lights of the other about that time. BEREAN blew a one blast signal, which was not answered by RELIANCE. In negotiating the bend, RELIANCE navigated somewhat to her starboard side of the channel. The pilot of the BEREAN noted and commented upon this maneuver. However, the maneuver was, to them, of little significance and did not cause the vessel to sheer away from the starboard bank, nor did it result in loss of control of her steering. In making the turn the RELIANCE pilot ordered her rudder five degrees to port. The rudder responded to the movement of the wheel and the vessel started to turn to port. At this highly important point, the steering gear of the RELIANCE failed; with the frozen rudder in a five degree port position. The quartermaster was unable to move the wheel in either direction and she continued to swing under that rudder setting. Thereafter, she did not straighten her course. After her captain, pilot and quartermaster determined that the wheel would not respond, her bridge notified the engine room to reduce speed and shortly thereafter to stop. On watch was the third mate who was ordered by the captain to find the chief engineer and advise him of the rudder failure. Her engine room was directed to give full speed astern. The pilot of the RELIANCE, recognizing the imminent danger, ordered her first starboard anchor to be dropped and shortly thereafter ordered her port anchor dropped. At this point, approxi-

mately 11:00 P.M., the RELIANCE sounded three blasts on her whistle. This was the only wistle signal she sounded. Efforts to transfer the steering control on her bridge from the telemotor system to the gyro-pilot failed and she continued to swing to her port, completely out of control. Prior to the emergency the RELIANCE'S four engines had all been coupled for maximum forward speed. Under orders for full power astern, the engine room reversed one set of two engines and coupled the same to the propeller shaft to give astern power. This, however, did not control the vessel's swinging to port, with some headway and she continued to have headway until she collided with the port side of the bow of the BEREAN. The remaining two engines were never reversed and coupled to the shaft. The other findings, with reference to fault, lack of fault, privity and other issues, we shall discuss in connection with the assignments of error.

## CREDIBILITY OF WITNESSES

The judge noted that several of the principal witnesses for the petitioner were impeached in connection with subjects of great importance. He pointed to the withholding of an important report by the petitioner, which report had received the approval of the captain. The report was entirely inconsistent, in a number of important respects, with the theory advanced by the RELIANCE. He also pointed to the impeachment, on important testimony, of the chief engineers and chief electrician of the RELIANCE.

## ASSIGNMENTS OF ERROR

Putting aside, for later discussion, the claims against Cyanamid and the claim of the United States, we summarize the assignments of error in the ensuing fashion:

I. That the judge erred in exonerating the BEREAN, because the record shows that she failed to stop, blow proper signals or proceed with caution after she first recognized that there was a risk of collision.

II. That the judge erred in exonerating the BEREAN, when the record shows that she failed to proceed at a moderate rate of speed on meeting a vessel that she was to pass.

III. That the judge erred in exonerating the BEREAN, when the record shows that she failed to keep a lookout on the bow or a proper lookout on the bridge.

IV. That the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

V. That the judge erred in exonerating the BEREAN, when the record disclosed that she was unseaworthy and at fault for transporting a poisonous, explosive and flammable cargo in her forward wing tank, next to the skin of the ship.

VI. That the judge erred in denying petitioner limitation of liability under 46 U.S.C. § 183 (a), against all claims made against it.

VII. That the judge erred in holding the petitioner and RELIANCE liable for loss and damage by fire to the RELIANCE cargo, because the fire originated from the other vessel and because petitioner, as a carrier, was exempt from such liability under the Bills of Lading and by virtue of 46 U.S.C. § 1304 (2) (b), and 46 U.S.C. § 182.

## ASSIGNMENT I

I. On this assignment, appellants charge that the BEREAN violated two of the Inland Rules[1] in failing to stop, blow proper signals or proceed with caution after she first recognized, or should have recognized, that there was a risk of collision.

It is contended that the BEREAN violated Rule I, when she (1) blew a one blast signal, proposing a port-to-port passing at a time when those in charge were in doubt as to the feasibility of such a passing, and (2) turned right two or three degrees before receiving a reply to her one blast signal. Rule III was violated, say appellants, when the BEREAN failed to blow a danger signal and reverse her engines immediately upon seeing the RELIANCE in a position that might force her to sheer across the channel. Practically all of appellants' arguments on this assignment are based on an assumption that the RELIANCE, did sheer off its starboard bank and that such fact was observed, or should have been observed, by Pilot Lary of the BEREAN. The judge saw and observed the witnesses and chose to believe Lary's version of what occurred and the reasons for his action, or lack of action, at the time. While Lary observed the position of the RELIANCE when the vessels were approximately one mile apart, he had no feeling that a collision was imminent until he heard the whistles of the RELIANCE and the sound of the anchor letting, at which time he recognized an emergency and gave a full speed astern on the BEREAN'S engines and a hard right rudder to put her aground in the mud bank at his starboard side of the channel. On these issues, the judge found that each vessel saw the other when the RELIANCE was making the

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1 33 U.S.C. § 203, Rule I.
33 U.S.C. § 203, Rule III.

bend at Five Mile Point, at which time they were approximately three miles apart. The BEREAN blew a one blast signal which was not answered by the RELIANCE. In negotiating the turn the RELIANCE navigated somewhat to the starboard side of the channel. This maneuver was noted and commented upon by Lary, but he considered it of little consequence. The maneuver did not cause the RELIANCE to sheer away from the starboard bank, did not cause loss of control of steering and did not precipitate the casualty. Prior to sighting the RELIANCE, approximately three miles away, the BEREAN had been navigating at "full ahead" and making thirteen to fourteen knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to one-half and shortly thereafter to "slow ahead." It was at this time that the one blast signal was given by BEREAN. While the one blast signal was not answered, Lary fully expected to make a normal port-to-port passing. He was somewhat apprehensive after watching the RELIANCE swing to port and turned the BEREAN slightly to starboard, still expecting to negotiate the port-to-port passing. Lary's order for full speed astern on the BEREAN'S engines and a hard right rudder were put in immediate effect. At this time the vessels were approximately one-fourth of a mile apart and closing on each other. The judge found that the BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger that the BEREAN was not at fault in failing to undertake a starboard-to-starboard passing. The judge found that she had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed in which such a passing might have been accomplished in safety. These findings are fully supported by the record and, in particular, by the testimony of the Pilot Lary

and the Mate Haugen. The piercing searchlight of hindsight, so skillfully employed by counsel for appellants, may point to other maneuvers that might have been taken successfully by the BEREAN. However, both we, and the judge, must interpret the record from the viewpoint of a prudent pilot under the circumstances then and there existing. Lary's conduct must be judged with reference to the circumstances at the time and not by a cool estimate of possible danger which might be formed after the event.

It is conceded that vessels, in this channel, are required to pass port-to-port—that meeting vessels must approach each other and pass by turning to starboard two or three degrees. This is in line with a judicially recognized custom in the channel. *Royal Navy of Italy v. Standard Oil Co. of N.J.*, 27 F.2d 331 (5th Cir. 1928). The cases cited by appellants, on this assignment, simply do not support their position. For example, the decision in *THE SANDMASTER*, 105 F.2d 1009 (2d Cir. 1939),[2] dealt with a situation where the Inland Rules and a special statute were confused by the pilot; this confusion led to a collision involving three vessels. The judge there held that the narrow channel rules did not apply to a section of the East River, near Brooklyn Bridge, but that navigation in that section was governed by the East River Statute. Obviously, that decision is of no assistance. On the other hand, the case on which the lower court and BEREAN rely, *VICTORY-PLYMOTHIAN*, 168 U.S. 410 (1897), is of compelling significance. The facts in that case are almost identical with the facts in this record. A lengthy discussion of that decision is unnecessary. It is enough to say that the decision

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[2] For factual statements see District Court opinion, 26 F. Supp. 64. This decision is reported **sub nom Construction Aggregates Co. v. Long Island R. Co.**

is in full and complete support of the findings and conclusions of the judge on this issue. Other cases cited by appellants, such as *RICHARD J. BARNES,* 111 F.2d 294 (2d Cir. 1940); *A. H. Bull v. United States,* 34 F.2d 614 (2d Cir. 1929); *MELROSE-SANDCRAFT,* 237 F.2d 884 (2d Cir. 1957), and others, involved crossed signals or a change of course of one of the vessels. Those cases are no more in point than the *SANDMASTER, supra.* We conclude that the findings and conclusions of the judge, on this issue, are supported by substantial evidence.

## ASSIGNMENT II

Appellants charge BEREAN with failing to proceed at a moderate rate of speed on meeting the RELIANCE, in violation of 33 C.F.R., § 207.180 (e) (3) (ii).[3] Appellants theorize that the BEREAN kept traveling at full speed ahead long subsequent to the time when, on seeing the RELIANCE in a position on the bend from which it was likely to sheer, she should have reduced her speed and reversed her engines. The judge's findings are in direct conflict with appellants' assertions. He found that the BEREAN observed the RELIANCE as she was in the turn of the channel about three miles away. Prior thereto, the BEREAN had been navigating at full ahead, or approximately 13 to 14 knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to "one-half" and shortly thereafter to "slow ahead." At this time the BEREAN gave the one blast signal, which was not answered by the RELIANCE. True enough, the pilot and watch officer of the BEREAN observed the RELIANCE somewhat close to her

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[3] "A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up, . . . ."

starboard bank of the channel and watched her swing to port, at which time they became somewhat apprehensive. The BEREAN, at this time, turned slightly to starboard. However, it was not until the BEREAN heard the three blast signal from the RELIANCE, and heard the sound of the anchor letting go, that the pilot of the BEREAN recognized an emergency. He forthwith blew three blasts in return, immediately ordered full speed astern on the BEREAN'S engines and gave her a hard right rudder, intending to put her aground. Compliance with these orders was immediate. The vessels were then closing on each other. There is nothing in the record on which the judge could find that a speed of 13 to 14 knots was not proper in the Channel. For that matter, appellant Mitsubishi practically concedes that such a speed below Morgan's Point would not be a negligent act. In any event, the district court has resolved the issue against the appellants and, in our view, such a resolution is not clearly erroneous. A prudent speed, under the circumstances, was an issue of fact for the judge, *Socony-Vacuum Oil Co. v. Smith,* 179 F.2d 672 (5th Cir. 1950).

Appellants' citations do not fit our facts. For instance, take *WM. A. PAINE,* 39 F.2d 586 (6th Cir. 1930), cited by China Union in support of its contention that BEREAN was guilty of statutory fault in proceeding at 13 to 14 knots. The *PAINE* involved an interpretation of certain regulations governing the speed of vessels through Maumee Bay Channel in the Great Lakes area. The regulation prescribed a speed of 10 miles per hour. Here, our regulation makes no mention of a maximum speed. There is no statutory speed limit in the channel applicable to the area of the collision. At the time of the collision in *DITMAR KOEL,* 65 F.2d 555 (5th Cir. 1933), the rules and regulations governing the use of the channel provided for a maximum

speed of 8 miles per hour. There, the judge held that a speed of 9 knots was excessive and this circuit upheld that finding. The statutory speed of 8 miles per hour was repealed by the adoption of the present rules. Additionally, the channel has been enlarged in depth and in width since the DITMAR KOEL decision.

Since we cannot say that the findings of the judge were clearly erroneous, we are governed by them. *Atkins v. Lorentzen,* 328 F.2d 66 (5th Cir. 1964). The decision in *GEORGE H. JONES,* 27 F.2d 665 (2d Cir. 1928), does not nullify the force or effect of the judge's findings against appellants on this issue.

## ASSIGNMENT III

Appellants say that the BEREAN failed to keep a proper lookout from the bridge, as well as from the bow, and in so failing, violated Article 20 of the Inland Rules, 33 U.S.C. § 221.[4] On this issue, the judge found that the BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 P.M. until the time of the collision. After so finding, the judge went on to hold that this failure did not cause, and could not have caused or contributed to, the collision. The judge found that Pilot Lary saw the RELIANCE several miles away and observed her lights constantly thereafter, and that, by reason of his familiarity with the channel, he recognized the danger at the earliest possible moment, under the then existing circumstances. He heard the only whistle given by the RELIANCE and

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[4] "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry light or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

took immediate action. During this period, Pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a majority of the time. He had gone to his cabin shortly before the emergency and returned to the bridge only moments before the collision. It was the helmsman's duty to proceed to the bow of the ship to serve as a lookout for one hour after being relieved at the wheel and before returning to duty. However, a general practice was followed on the BEREAN, which permitted the helmsman a 10 to 15 minute coffee break after leaving the wheel and before proceeding to the bow, if weather and visibility permitted and the vessel was proceeding routinely. It was during this interval that the emergency arose. Both bow anchors of the BEREAN were ready to let go, but she had no one standing by the windlass to serve as an anchor watch. By reason of the nature of the channel in that area, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point. Other findings go into considerable detail on the issue of lookout.[5] The judge found that a lookout "could have done nothing more" than was done by the pilot of the BEREAN under the same circumstances and conditions.

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[5] "16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour."

"21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE."

"37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger."

Appellants' proctors, again in the brilliant light of considered hindsight, have carefully reconstructed the events leading up to the collision and argue that Pilot Lary could not have seen what happened and that the absence of a bow lookout was, in fact, causative. It is fundamental that the judge did not have to accept a theory adopted by counsel, as against the positive testimony of Pilot Lary, the watch officer Haugen and tug captain Starkweather. It is argued that the location of the RELIANCE'S anchors, following the collision, demonstrates that she moved extremely close to her port bank at the time her star-board anchor was dropped and that she then moved back toward the center of the channel before the port anchor was dropped. This argument shows the resourcefulness of appellants' proctors, but it does not prove that a bow lookout would have been of aid to the BEREAN. Obviously, the judge had more faith in the channel course, as shown by the RELIANCE'S instruments, than in post casualty theories, advanced by proctors. Furthermore, the judge could well have believed the testimony that the position in which the starboard anchor was found did not indicate that this was the position of the anchor at the time it was first dropped. Again, we observe that the judge had an opportunity to see and observe the witnesses. We are satisfied with his analysis of the evidence. His finding that the failure to have a lookout did not cause and could not cause or contribute to, the collision is supported by substantial evidence.

*THE PENNSYLVANIA*, 86 U.S. (19 Wall, 125 (1873)), and other cases cited by appellants, do not compel a different result. Appellants would have us give birth to a rule, that every vessel guilty of a statutory fault has the burden of establishing that its fault could not, by

any stretch of the imagination, have had a causal relation to the collision, no matter how speculative, improbable or remote. *THE PENNSYLVANIA* does not go that far and this court so stated in *Compania De Maderas v. THE QUEENSTON HEIGHTS*, 220 F.2d 120 (5th Cir. 1955), *cert. denied* 350 U.S. 824 (1955). Appellants reliance on *G. B. Zigler Co. v. Barker Barge Lines*, 167 F.2d 676 (5th Cir. 1948), and *Smith v. Bacon*, 194 F.2d 203 (5th Cir. 1952), place them on tenuous grounds. The decisions in *Zigler* and *Bacon* have been molded and placed in proper perspective by later decisions in *Parker Bros. & Co. v. De Forest*, 221 F.2d 377 (5th Cir. 1955), and *Atkins v. Lorentzen, supra.* Nor can appellants go outside the circuit and find comfort in authorities such as *Esso Standard Oil Co. v. THE MALUCO*, 332 F.2d 211 (4th Cir. 1964), or *Circle Line Sightseeing Yachts, Inc. v. City of New York*, 283 F.2d 811 (2d Cir. 1960). In *MALUCO* the pilot, in contrast to our situation, could not see the lights or maneuvers of the approaching vessel. If, in *MALUCO*, the judge had found that the pilot of the vessel saw everything which a bow pilot lookout could have seen, undoubtedly, the Fourth Circuit would not have reversed. The basic holding in that case was that the tug's general lookout was inadequate and that a special lookout was needed.[6] The most that can be said of *MALUCO* is that failure to maintain a lookout is not the equivalent of statutory fault, but does give rise to a strong influence that such failure contributed to the incident and imposes on the vessel a heavy burden to show, by clear and convincing evidence, that it did not so contribute. Here, the judge's findings and conclusions were within the permissible limits of that deci-

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[6] "But if a special lookout was not needed, the tug must plead the adequacy of her general lookout in order to meet her burden." 332 F.2d 214.

sion. We feel that the decision of the same circuit in *United States v. SS SOYA ATLANTIC,* 330 F.2d 732 (4th Cir. 1964) (1964 A.M.C. 898, affirming 213 F. Supp. 7, 1964), rendered a few days after *MALUCO,* is more applicable to the case before us. There, the court held that the district court findings were binding unless clearly erroneous and that the absence of a lookout, having no other duties, is not a basis for a finding of fault if the bridge actually observes what a lookout should have seen. One of appellants urges that no one abroad the BEREAN was serving as a lookout solely in such capacity and without other duties to distract him. *Circle Line Sightseeing Yachts, Inc. v. City of New York, supra,* is cited. The distinguishing feature of *Circle Line* is that the lower court failed to make a finding on whether the lookout, with no other duties, could have seen the bridge earlier and either avoided the accident or, at least, diminished its severity. Here, as previously mentioned, the trial court found, as a fact that the absence of a bow lookout not only did not cause the collision, but could not have caused or contributed to it.

A discussion and analysis of other cases cited by appellants, such as *THE OREGON,* 158 U.S. 186 (1895); *THE FELIX TAUSSIG,* 5 F.2d 612 (9th Cir. 1925), *cert. denied* 269 U.S. 560 (1925); *Poling Russell Inc. v. United States,* 196 F.2d 939 (2d Cir. 1952), and *River Terminals Corp. v. United States,* 121 F. Supp. 98 (E.D. La. 1954), would add nothing to the enlightment of the profession nor to the validity of our conclusions.

The question of a proper lookout is one of fact to be determined from all of the circumstances on the basis of common prudence, there being no fixed requirement that a vessel maintain a "bow lookout" under the facts and cir-

cumstances here presented. The finding of the trial judge on this issue was clearly within the realm of reason. The evidence established beyond doubt that the absence of the bow lookout had nothing whatsoever to do with the collision.

## ASSIGNMENT IV

The appellants claim that the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

The record supports the judge's finding that the BEREAN was not at fault in failing to have an anchor watch prior to or at the time of the collision, or in failing to drop her starboard anchor as ordered by her pilot. The evidence is clear that it was not the custom of the ships to maintain an anchor watch in the portion of the channel in question, particularly when the vessel had sufficient power, as the BEREAN had, to readily maneuver. Furthermore, the judge found that even if the anchor of the BEREAN had been dropped when her pilot ordered, this procedure would have had little, if any, effect on slowing the vessel and would not have prevented the collision. In other words, BEREAN took the quickest and most certain method of losing headway by running aground. The record shows, and the judge found, that when the BEREAN'S pilot recognized the emergency and ordered the engines full astern and a hard right rudder, he likewise ordered the starboard anchor dropped. The starboard officer who was on the bridge with the pilot immediately started to obey the order. Before he reached the bow he felt the BEREAN go aground and observed the RELIANCE bearing down on the port bow of his vessel in a manner which presented an inevitable collision. For that reason, he did not try to drop the anchor.

The BEREAN ran aground on her starboard side of the channel, either immediately before or at the time of the impact. At such time, she had little, if any, headway. Likewise, the RELIANCE had lost most of her speed at this time. Appellants' argument that if the BEREAN had an anchor watch, he could have forthwith dropped the anchor and thus stopped the BEREAN and avoided the collision, is directly opposed to the findings of the judge. There is little, if any, evidence to support this argument. For that matter, the great weight of substantive evidence is against such a contention. The dropping of an anchor when a vessel is making 8 or 9 knots would, on the record, violate good seamanship. Most of the experts were of the view that the dropping of an anchor or anchors from a vessel proceeding to five knots or more, with a view of stopping or even slowing the vessel, would be highly dangerous and probably futile. Such a maneuver would burn the brake bands and at a speed of 8 to 10 knots would result in breaking the anchor chain. No witness testified that he ever dropped an anchor under such circumstances. The expert testimony on this subject was not only convincing, but was in line with what would seem to be good common sense.

Typical of the cases cited by appellants are *THE VIRGINIA*, 25 F.2d 623 (2d Cir. 1928); *River Terminals Corp. v. United States, supra,* and the *Mariblanca Navegacion, S.A. v. Panama Canal Co.*, 182 F. Supp. 369 (D.C. C.Z. 1956), *aff'd.* 298 F.2d 729 (5th Cir. 1962). As applied to the facts of this cause, those cases give us nothing of substance. *Mariblanca* involved a defective steering gear and failure to drop anchors in the Panama Canal. That area is governed by a specific statutory requirement that

anchors be in a state of readiness for letting go.[7] There, the judge held that the accident was caused by a failure of the vessel's steering mechanism and by failure of the vessel's personnel to promptly execute the orders of the pilot with respect to the engines and anchors. In the final analysis, this case merely stands for the proposition that an appellate court will not set aside the finding of a judge unless "clearly erroneous." *THE VIRGINIA* involved a "comedy of errors." The third officer was sent forward to let go an anchor, but dropped the wrong anchor. This required the third officer to run forward to the forecastle head and drop anchor. This he did, but dropped the starboard instead of the port anchor thereby pulling the vessel so that she sheered directly toward the ship with which she collided. The appellate court, on this issue, merely affirmed the finding of the judge. Following the same pattern is the decision in *River Terminals Corp., supra.* There, the judge found that the dropping of anchors might have avoided the collision—that the failure to drop them was at least a factor contributing to the casualty.

A discussion of other cases cited by appellants would only lengthen an opinion which, with much left to be said, is already beyond the Pale.

## ASSIGNMENT V

China Union, and Lan Jing-Chau, et al, charge that the BEREAN was unseaworthy by reason of dangerous cargo being placed in a forward wing tank, next to the skin of the ship. This assignment is related to, but must be distinguished from, the assignment of these appellants that Cyanamid was at fault in failing to warn the BEREAN of

[7] 35 C.F.R. 4.41.

the lethal qualities of the cargo. Later, we shall treat of that charge and of China Union's standing to raise these questions.

As early as 1871 the Congress took an interest in legislation on dangerous articles or substances in commerce.[8] The legislation in effect at the time of the casualty[9] empowered and directed the commander of the Coast Guard, in order to secure effective provisions against the hazards of health, life, limb or property created by explosives or other dangerous articles or substances, to, by regulation, define, describe, name and classify all explosives or other dangerous articles or substances and to establish such regulations as might be necessary to make effective the provisions of the section with respect to the descriptive name, etc.[10] The legislation further provided that the transportation, stowage or use of such articles or substances should be in accordance with the regulations. These statutes, and the regulations promulgated thereunder,[11] make it clear that the duty is placed on the Coast Guard to properly examine, analyze and classify all cargoes such as the one here in question. It did so examine this type of cargo and classified it as Grade C flammable liquid, it being placed, as previously mentioned, in the same clasification as gasoline, benzine, naptha and other such substances.[12] It was not classified as a poison either "extremely dangerous" or "less dangerous,"[13] or with having lethal characteristics. It has been said, and rightfully so,

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8 16 Stat. 440.

9 46 U.S.C. §§ 170, 170 (a), 170 (b).

10 46 U.S.C. § 170 (7) (a).

11 46 C.F.R. 146.01.

12 45 C.F.R. 146.21-100.

13 46 C.F.R. 146.25-5; 146.25-10.

that these statutes and the regulations promulgated thereunder amount to much more than a set of prohibitions with punitive sanctions. They establish a standard of care. *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964).

The judge found that the BEREAN was not at fault in carrying acrylonitrile in her forward wink tank. The ship had been engaged in the chemical trade for several months following her construction, and prior to the collision carried various kinds of petroleum products and other flammable liquids in her forward wing tanks. The shell, or skin, of the ship constitutes the outer wall of certain of her wing tanks. No protective cofferdams or voids surrounded these tanks. Under pertinent Regulations those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics."[14] Acrylonitrile is similar to gasoline in its burning and explosive characteristics. In addition, it is toxic, and gives off poisonous fumes. These fumes cause illness to persons exposed thereto in relatively weak concentrations over a prolonged period of time and may cause illness or death from a single exposure if in a sufficiently high concentration. Symptoms of this poison are similar to those of cyanide.

Appellants claim that the Coast Guard was in error in not classifying acrylonitrile in the same classification as poisonous gases, or with those having lethal characteristics, as to which different regulations apply. It is said that such a cargo should not be carried in the forward tanks, or that a cofferdam or void space should have been provided between the tank and the skin of the ship. A rule that this type of material should not be carried in the forward tanks of the

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14 46 C.F.R. Part 39.

vessel would probably destroy a substantial segment of the carrying capacity of most tankers. The fact, if it be a fact, that "a large majority of collisions are on the bows of vessels" does not mean that the forward part of a vessel should not be used for the purpose of transporting liquids such as acrylonitrile. No custom or usage is advanced to support this argument. No Regulations were violated by placing the cargo in the forward tanks. For that matter, the regulations of the Coast Guard invited the procedure which was followed by BEREAN in the stowage of this cargo. The charge that the cargo should have been stowed in tanks with a cofferdam, or void, apparently was suggested by a Regulation covering the stowage of "flammable or combustible liquids having lethal characteristics." The appellants concede that the Regulations, in effect at the time of the casualty, did not classify the chemical as a flammable or combustible liquid having lethal characteristics.

The Regulations properly distinguish between a chemical which is highly flammable and a chemical which is highly toxic or one having lethal characteristics. Of course, a chemical may be both flammable and toxic and, if sufficiently toxic, should be placed in a different classification than one which is only flammable. To be kept in mind is the fact that the Bill of Lading issued by Andersen to Cyanamid, specifically described the cargo as acrylonitrile, and that the Regulations did not classify the chemical as an explosive, or as a Class A, B or C poison. During the course of the negotiations leading up to the issuance of the Bill of Lading, the export manager of Cyanamid furnished to representatives of Andersen the pamphlet entitled, "Handling-Storage-Analysis of Acrylonitrile." The physical properties of the chemical, including its explosive limits, the fact that it was toxic and that it was flammable are set

forth in the pamphlet. This is conceded by Andersen. However, it is argued that the ship, and her owner, had a right to rely on the classifications of the Coast Guard made pursuant to the statutes and regulations, and that a stowage of cargo in accordance with such regulations, insulates the vessel and her owner against a charge of unseaworthiness or negligence in connection with such stowage. Although the language used in *Marshall v. Isthmian Lines, Inc., supra*, p. 134, 135[15] speaking of the Regulations, was employed in connection with a factually distinguishable background, we think the rule there stated is sound, and should be applied to this charge against BEREAN and Andersen. Another statement of the same legal principle is that official duty has been legally performed. The law so presumes. *Board of Public Instr. v. Osburn*, 101 F.2d 919 (5th Cir. 1939); *Continental Bank & Trust Co. v. Brandon*, 297 F.2d 928 (5th Cir. 1962); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

We do not believe that BEREAN and Andersen were required to inquire into the validity of the classification of the chemical made by the Coast Guard experts. As applied to the ship and her owner, there was nothing in the Cyanamid pamphlet which would require a different result.

Again, on this point, we are faced with a line of authorities that are distinguishable. Take for instance the *Petition of Oskar Tiedemann and Co.*, 289 F.2d 237 (3d Cir. 1961). The question before the judge was whether the owners of a tanker could claim limitation of liability after they al-

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15 334 F.2d 134, 135.

"The whole statutory scheme is something much more than a set of prohibitions with punitive sanctions. It establishes a standard of care to which all concerned are bound, including those who do, and those who do not, wish to comply."

lowed her to sail with tanks that had been emptied of a cargo of petroleum, but contained flammable fumes. The court found that the fumes were more dangerous than liquid cargo and that the vessel did not have proper gas-freeing apparatus and was, therefore, unseaworthy. Again, this is a case where the findings of the judge were upheld. In *C. J. Dick Towing Co. v. THE LEO*, 98 F. Supp. 455 (S.D. Tex. 1951), *aff'd.* 202 F.2d 850 (5th Cir. 1953), gasoline or some other explosive liquid had been allowed to leak into the end section of a barge. This section was not intended for cargo. The judge held that those in charge of the vessel were negligent in not properly inspecting the tow and in allowing the rake tank to be in such a condition that it was a menace and a hazard. Of course, there is no such finding before us. That the existence of gasoline or other explosive fumes, in an area of a ship not designed for that purpose, creates an unseaworthy condition, we have no doubt. No such problem confronts us. The negligent stowage of flammable cargo in a maner which violated approved methods of stowing naphthalene as delineated in the safety regulations of the Coast Guard and of the Dutch Government, was presented by the facts in the *Petition of SKIB A/S JOLUND*, 250 F.2d 777 (2d Cir. 1957), reaffirmed on second appeal 269 F.2d 68, *cert. denied* 356 U.S. 933 (1958). That case offers an interesting dissertation on that type of liability, but is here of no significance. The same can be said of *In Re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952) and *Dalehite, et al, v. United States*, 346 U.S. 15 (1953). Such decisions do not remotely support appellants' contention that a tanker may not store flammable cargo in her bow tanks. Again, we have an issue which the judge resolved against appellants. The evidence supports his finding.

## ASSIGNMENT VI

Appellants Mitsubishi and Consul General part company with China Union, on the latter's contention that the judge erred in denying it a limitation of liability under 46 U.S.C. § 183 (a).

Our analysis of the record convinces us that the judge was correct in denying China Union limitation and in holding that its own negligence with privity and knowledge contributed to the unseaworthiness of the RELIANCE and the collision as follows:

(a) her steering gear was unseaworthy;

(b) her main engines were unseaworthy;

(c) her captain and chief engineer were not instructed to the effect that all four of her main engines might be coupled astern; and

(d) her telephone communication system between the bridge, engine room and steering engine room was unseaworthy.

We have already dealt, at length, with the judge's findings on the fault of the RELIANCE. Those findings are buttressed by an adequate record. To here repeat those findings would be repetitive in the extreme.

Privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection. Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation. The judge in holding that there was privity and knowledge on the part of China Union and in denying limitation was well within

the standards applied in *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963).

Instead of showing that the unseaworthiness of the steering gear of the RELIANCE was without the privity and knowledge of China Union, its witnesses provided damaging testimony clearly showing the contrary. First of all, the Greek Nationals, by whom the vessel was sold to China Union, would not permit a thorough inspection of the vessel by its representative. On the limited inspection he made, he found many conditions in the engine room which were sub-standard. On his survey of the RELIANCE, he found the door of the steering engine room locked. On arrival of the vessel in New Orleans, the first chief engineer recommended to the company that all auxiliary engineering equipment be opened, inspected and overhauled. Nothing was done on this recommendation. China Union, evidently in an effort to save expenses, did not make such inspections, breakdown or overhaul. The testimony is quite clear that China Union would not permit a thorough inspection of the steering gear while the ship was in Taiwan. Many spare parts, which would be normally carried on a vessel of this type, were missing and, in particular, essential parts in connection with the steering apparatus were missing. This, and other evidence, fully supports the judge's finding[16] of privity and knowledge of a defective

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16 "The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost constant difficulties

steering gear on the part of the owner. Likewise, the judge's findings that the vessel was unseaworthy in the other respects with the privity and knowledge of China Union are as fully supported by the evidence. *THE CITY OF CAMDEN*, 292 F. 93 (3rd Cir. 1923), cited by China Union, lends neither substance nor support to its contention. On the other hand, the principles stated in that case are in full accord with the findings here under attack. The burden of proof as to the absence of privity or knowledge was on China Union. *Coryell v. Phipps*, 317 U.S. 406, 409; *States S.S. Co. v. United States*, 259 F.2d 458 (9th Cir. 1958), *cert. denied* 358 U.S. 933 (1959), *rehearing denied* 359 U.S. 921 (1959); The Law of Admiralty, Gilmore & Black, 705.[17]

We do not question the soundness of the authorities cited by China Union on this assignment. Yet, the attempt by it to apply the doctrines stated in those cases to our factual background is entirely unsuccessful. Her claim that the RELIANCE'S sheer across the channel was caused by her navigating too close to her starboard bank is foreclosed by the judge's finding that the sheer was caused by unseaworthy steering gear. The district court's findings that the RELIANCE'S main engines were unseaworthy and that her captain and chief engineer were not properly instructed prevent a successful assault along those lines. China Union states that there is no evidence whatsoever to support the

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encountered with the main engine, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction." (F. 31, R. 5133-5134.)

[17] "It seems reasonable that the shipowner, who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge."

judge's finding that the RELIANCE'S telephone communication system between the bridge, the engine room and the steering room was unseaworthy. This statement is clearly wrong. The record contains uncontradicted evidence that when the emergency arose on the RELIANCE, and communications had to be made between the bridge and the engine room, and between the bridge and the steering engine room, this was accomplished by sending messengers running about the ship, rather than by attempting to use the sound powered phones. Certainly, this creates a strong presumption that the phones were out of order. This evidence and the inferences to be drawn therefrom, clearly support the judge's finding that this condition contributed to the collision and that there was no direct means of phone communication between these important stations on the vessel. Obviously, a prompt telephone call to the steering engine room for full speed astern, might well have averted the collision.

There is no substance to this assignment.

## ASSIGNMENT VII

On this assignment, appellant China Union disclaims liability on the theory that the fire originated from the other vessel and that it, as a carrier, was protected under its Bill of Lading and the Fire Statute.

The provisions of CGSA[18] required China Union to exercise diligence: (a) to make the ship seaworthy; (b) to properly man, equip and supply the ship. Subsection (8) of the Act nullifies any clause, covenant or agreement in a contract of carriage which would relieve the carrier or the ship from liability for loss or damage, to or in connection

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18 46 U.S.C. §§ 1300, et seq.

with the goods, arising from fault or failure in duty in the obligations imposed by the Act. 46 U.S.C. § 1303 (8). Section 1304 (1) places on the carrier the burden of proving due diligence when the loss or damage results from unseaworthiness. These provisions and the finding by the judge of unseaworthiness on the part of the RELIANCE, places the petitioner beyond the protective provisions of the Act. The particular fire was "caused by the actual fault with privity of the carrier." CGSA offers no escape to China Union. Even if the issues were doubtful they would be resolved in favor of the cargo. *THE SOUTHWARK*, 191 U.S. 1 (1903); *Artemus Maritime Co., Inc. v. Southwestern Sugar & Molasses Co., Inc.*, 189 F.2d 488 (4th Cir. 1951).

## CLAIM AGAINST CYANAMID

China Union and the Consul General complain of the action of the judge in dismissing the libel against Cyanamid. Aside from the subject discussed under Assignment V, the appellants pose two additional assignments against Cyanamid: (1) the procedure on the dismissal, and (2) that Cyanamid had actual knowledge, or by the exercise of reasonable diligence should have known, of the dangerous, poisonous and lethal characteristics of acrylonitrile, of which the Coast Guard and BEREAN had no knowledge.

At the outset, we must stress the grave doubts we entertain on whether China Union has standing to press these assignments. The damage to RELIANCE and its cargo was caused by fire, not by the poisonous or toxic qualities of the chemical. Since gasoline and other such products are as flammable and explosive as acrylonitrile and since such other products may be legally carried in forward tanks, next to the skin of the ship, it would seem that no causal relationship exists between the toxicity of that chemical

and the fire damage to China Union's property, or its cargo.

(1) The first point is one of procedure, rather than substance. The record shows that during the course of the trial, the judge asked all parties if all evidence, except as to damages, had been presented against Cyanamid. After counsel for the respective parties indicated that they had no additional evidence to offer against that company, its proctor moved for a dismissal.[19] Forty pages of the record are devoted to a transcription of the arguments of the proctors on this motion. No claim was made that there was additional evidence to offer on the subject. For that matter, the precise issues raised on this appeal were fully argued to the judge. At the conclusion of the arguments, the motion was taken under advisement and was not decided until the following morning, at which time the judge found in favor of Cyanamid.[20] Obviously, the judge made findings on the issues then before him. In the formal findings, the judge made it clear that he was passing on the issue

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19. "Mr. Waesche: If Your Honor please, in that event we would like to move to dismiss the action against American Cyanamid, on the grounds that the libelants have failed to establish a cause of action against them." (R. 3413.)

20. "As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R.3454.)

of the liability.[21] We must view this record as the findings of the judge on the issues then presented. Those findings, unless clearly erroneous, even though informal, are binding on us. *Myles v. Quinn Menhadden Fisheries*, 302 F.2d 146 (5th Cir. 1962). The fact that the findings were made on a motion for dismissal, or for a *directed verdict*, as argued by one of appellants, is of no significance.

(2) On the motion for dismissal, the proctor for Cyanamid argued that the evidence almost conclusively demonstrated that the Chinese crew men died or were injured as a result of the raging fire, on the water and on the RELIANCE. Proctor for the dead and injured seamen, on the other hand, argued that the men died from, or were injured by, the toxic and poisonous effects of the chemical. Cyanamid pointed to the evidence of a young lieutenant of the Coast Guard who testified that he and his men worked right at the hatch where the particular cargo was loaded, and from there fought the fire with no ill effects. A number of the members of the crew of the BEREAN testified that they went forward and fought the fire with no ill effects. The master of the tug boat said that he was in there fighting the fire. Members of the crew of RELIANCE were on the foredeck fighting the fire. Most of the photographs of decedents, with one exception, disclose faces and bodies that were "badly charred."

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21 ". . . **At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence produced by petitioner.** The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against the respondent." (Emphasis supplied.) (R. 5118.)

The one major exception was the picture of a Chinese second mate, who evidently died in the cabin deck washroom. He was not burned, nor was there anything else observed which pointed to the cause of his death. The photograph in evidence, and the testimony shows, that the pilot Duncan was burned beyond recognition.

In support of his position, proctor for the injured and decedents, called attention to the unburned body of the second mate that was found in the washroom, the body of the oiler-wiper who was found above the main deck and who was not "burned too seriously," and to the testimony of the funeral director that he examined five bodies which were recovered in Galveston Bay, over one week after the casualty. He testified that he did not find burns "to any noticeable degree." These bodies were puffed and swollen to such an extent that examination was difficult. The undertaker thought that the death of each of these men was caused by drowning.

Even the death certificates do not support the theory that death could have been caused by the toxic or poisonous effects of the chemical under observation. Five of the certificates gave the cause of death as "drowning, due to jumping overboard"; five of the certificates gave the cause of death as "suffocation, 2nd & 3rd degree burns," and one certificate gave the cause of death as "septisemia, due to major thermal body burns." Even as to the decedents whose deaths were attributed to drowning, the funeral director conceded that there were burns on the bodies.

In any event, both in the testimony and on the argument, the theory of the Consul General was fully presented to, and explored by, the able trial judge. After analyzing all of the evidence, he found that the deaths and personal

injuries were caused by fire.[22] While this specific finding was not made at the time of ruling on Cyanamid's motion for dismissal, no additional evidence was produced on the subject. For that matter, the final dismissal as to Cyanamid is a part of the main interlocutory decree, from which this appeal is prosecuted. This dismissal, of course, was entered after the entry of the findings and conclusions. Therefore, Cyanamid is entitled to the benefit of each finding on which the decree is based.

If, in fact, it could be said that the judge failed to make a finding on the issue of the cause of death or injuries, nevertheless, the burden of proof on that issue was on the Consul General. Consequently, all facts not embraced in the specific findings should be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens*, 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant*, 143 F.2d 170 (7th Cir. 1944), *cert. denied* 323 U.S. 734. Appellant had a right to seek a specific finding if he so desired.

Any other finding by the judge, on the record before him, would be based on pure speculation and guess work. This is conceded by Dr. Brieger, the principal witness for China Union and its dead and injured crew members, who testified that an autopsy would be required before even an expert could express an opinion on whether any one of

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[22] "As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130.)

these men died from exposure to acrylonitrile.[23] With the opinion in the record, a trial judge could arrive at no conclusion other than that the Consul General had failed in his burden of showing that death or injury was caused from the toxic effects of the acrylonitrile.

Completely disregarding the effect of the controlling finding that fire was the cause of the deaths and personal injuries, both China Union and the Consul General again point to testimony indicating a practice in the chemical industry to construct cofferdam space around tanks in which dangerous chemicals are to be transported and that one of the purposes of such construction was to prevent the escape of such chemicals in the event of a collision. Other testimony indicates that it was a common practice in the industry to carry dangerous chemicals away from the skin of the ship. Doctor Brieger testified that sufficient bodily contact with acrylonitrile would, in his opinion, cause death by ingestion or by inhalation of its fumes. He, likewise, opined that acrylonitrile was much more poisonous than a five percent dilution of hydrocyanic acid which, by Coast Guard Regulations, was classified, for transportation purposes, as a Class B poison. He thought that the statement in Cyanamid's literature that acrylonitrile produces symptoms "similar to those produced by hydrogen cyanide"

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[23] "An autopsy would show whether the man, in addition to the effect of the fire, has absorbed large quantities of acrylonitrile, which, as I have told, will be converted into cyanide, a very easy affair; it can be shown with a spectrophotometer and otherwise; and if such an autopsy is made, one can state whether this individual had absorbed such quantities of acrylonitrile that they in themselves would have killed this man. **But this can only be done—such a statement can only be made if a proper autopsy has been made, or if the blood is bright red; that's a much simpler method. It would indicate that the man has indeed absorbed very large quantities or large quantities of acrylonitrile, with the consecutive development of cyanide.**" (Emphasis supplied.) (R.2129.)

was incorrect. His thought was that the symptoms were precisely the same, but this is a mere play in words, and not of substance. He also believed that if rat tests had been made by the Coast Guard with the chemical, it probably would have been classified in a Class B category as toxic or poisonous in nature. The judge was not bound to accept and apply these opinions. He was only bound to give to them such weight as he thought they deserved and he was at liberty to entirely reject them if he felt that the reasons given in support thereof were unsound. This rule is applicable to a trial judge, as well as a trial jury. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Also, the judge had the opportunity to see and hear the witness and pass on his credibility.

Beyond that, the printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error. Of significance, though not controlling, is the fact that the casualty occurred in November, 1961. There was an immediate Coast Guard investigation. The classification of acrylonitrile has been reviewed by the Coast Guard on at least three occasions[24] since the casualty and remains in the same classification. The legal principles applied in *Whorton v. T. A. Loving & Co.*, 344 F.2d 739 (4th Cir. 1965), are sound, but the factual background there discussed is so far removed from ours that such principles

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[24] (1) 46 C.F.R. § 146.21-100, p. 172, §146.25-200, p. 495-694; (2) 46 C.F.R. § 146.10-100, p. 20, § 146.25-200, p. 220-256; (3) Federal Register, December 24, 1964, Vol. 29, No. 248, pp. 18163-18168.

cannot be here applied. For the purpose of this opinion, we have assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual.

Aside from everything else, it would appear that the proximate cause of death of and injuries to the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed. The remarkably clear pictures in evidence demonstrate that the RELIANCE ruptured the skin of the BEREAN and advanced into the hull to a depth of approximately 14 feet. Obviously, the inside skin of a cofferdam would have been ruptured and such a dam would not have prevented the escape of the chemical. Under the weight of this assault, a cofferdam would have provided no more protection that would a sheet of tissue paper.

## CLAIM OF UNITED STATES

China Union alone challenges the claim of the United States. The claim consists of three separate items:

(1) expense of removing and re-anchoring the RELIANCE, $8,582.00, and

(2) expense of shipkeepers and similar expenses to preserve the property, $6,031.38, and

(3) expense of stand-by tug to prevent the vessel from moving and re-blocking the channel, $21,188.00.

That the RELIANCE, as a result of the casualty, became a flaming derelict which imperiled the very existence of other watercraft and obstructed and prevented the navigation of the channel, is beyond argument. The owner and underwriters were unable to control the fire. Acting under the emergency provisions of 33 U.S.C. § 415, the United States District Engineer, after a special investigation, made a determination that the RELIANCE was a special danger to navigation and, after notice to owner, directed that the vessel be towed from the channel and anchored in Bolivar Roads, adjacent to the channel.

After removal of the vessel, the United States filed a libel, asking for the sale of the vessel,[25] to pay the cost of removal and incidental expenses. This proceeding was enjoined, on November 29, 1961, on China Union's petition for a limitation of liability. After granting the injuncton, the judge required China Union to pay into court the cost of removal of the vessel in the sum of $8,582.00. Other proceedings, and allowances, are outlined in detail in *American Cyanamid Co. v. China Union Lines,* 306 F.2d 135 (5th Cir. 1962), in which proceeding the circuit court refused jurisdiction, but suggested that the district judge might make findings on the issues presented.

On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds $8,582.00, the expenses of removal. While the Government could not proceed *in personam,* against China Union, *United States v. Bethlehem Steel Corp.,* 319 F.2d 512 (9th Cir. 1963), *cert. denied* 375 U.S. 966 (1964) and *United States v. Zubik,* 295 F.2d 53 (3rd Cir. 1961), we must remember that

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25 Sold as scrap for $109,100.00.

it was China Union which was seeking the injunction and a limitation of its liability. It was to its advantage, and the advantage of its underwriters, to free the RELIANCE of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right.[26] The order of the court did not amount to a judgment *in personam* against the petitioner, but merely required China Union to do what it should have done in the first instance.

On December 3, 1962, after receipt of the mandate of the Court of Appeals, the judge held a supplemental hearing, at which time testimony was taken and exhibits introduced in connection with the nature and reasonableness of the Government's and other claims. Eighteen witnesses testified at this hearing and there is solid evidence to support the finding in favor of the Government. The fact that the judge's finding on the subject, is included under his conclusions of law,[27] is of no significance. *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil*

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[26] "Had this Court not intervened . . . the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A." (Order, January 28, 1963.)

[27] "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States."

*Co., et al,* 292 Fed. 846 (2d Cir. 1923); *Arkansas Amusement Corp. v. Kempner,* 57 F.2d 466 (8th Cir. 1932). Even in the absence of a finding of fact, this being a trial *de novo,* we would be compelled to say that the record fully supports the pertinent provisions of the interlocutory decree. True enough, specific amounts are not mentioned in this finding. However, there can be no misunderstanding as to the amounts, in that the division of the Government's claim, both in the exhibits and the testimony, was uniform and precise. They are the figures which are set forth, with exactness, in the interlocutory decree.

It is our view that item (3) of the Government's claim is also covered by the provisions of 33 U.S.C. § 415, and that the lien against the RELIANCE for such item was also first in time and prior in right. The statute contemplates that the Government hold said vessel for a period of thirty days, after notice to the owner, and thereafter until sale. It is logical to assume that the Congress intended the Government to take proper care of the vessel during possession. The "expense of removing," in our opinion, should not be limited to the precise cost of removing the vessel from the place of the casualty to a place of safety, but should also cover any and all reasonable expense incidental to the removal and enforcement process, such as the expense of safe-guarding. This expense is contemplated by the statute. Petitioner's arguments that the tug hire of $21,188.00 was not a legitimate expense, is illusory in the extreme. The record discloses many considerations which weighed in favor of having the tug stand by, rather than using two anchors. The District Engineer, after consultation with Coast Guard officers, decided to use only one anchor and have the tug stand by, so as to be assured of its immediate availability in case the anchor did not hold.

Those making the decision were of the opinion that (1) two anchors might foul the vessel, (2) the anchor windlass and the deck supporting it had been subjected to severe fire, (3) the "upper shots" of the anchor chain had been subjected to severe heat, (4) the Galveston area was subject to severe changes in weather conditions, (5) the tide was exceptionally swift where the vessel was anchored, and (6) the vessel, even with dual anchors, might well slip back into the channel. True enough, the court eventually found that the tug was not necessary to keep the RELIANCE at its anchorage, and this is the point on which China Union principally relies. Here, the mischievous aura of validity which lurks behind the veil of hindsight is again presented. The original action of the District Engineer in ordering the tug to stand by, when viewed in light of his obligation to protect the traffic in the channel without unduly jeopardizing the vessel and its cargo, is quite understandable. The judge's action, in subsequently ordering the tug dismissed, was taken after more than two weeks of actual experience in holding the vessel at anchor. It does not imply disapproval of its previous use; indeed, doubtless because of his own wise reluctance to be governed by hindsight, the judge expressly refused to pass on that question at that time. The record reveals no subsequent developments weighing against his ultimate approval of the charge.

On November 27, 1961, the judge dismissed the tug from standing by the RELIANCE and, on that day, placed shipkeepers aboard pending the further order of the court. At the same time, custody of the vessel was taken by the United States Marshal and the court was thereafter in possession. Earlier, on November 24th, the District Engineer, acting on order from the United States Attorney's

office, caused shipkeepers to be placed aboard and the cost of employing those shipkeepers, round the clock, both before and after the court order is, in major part, the basis for the Government's claim of $6,031.38. China Union charges that the Government was no longer in possession of the vessel and is not entitled to this allowance. This claim is without validity, whether we view the service performed as under the statute, or as an allowance by the court to the Government for expense incurred in connection with protecting the vessel, after the seizure by the Marshal. Our only area of doubt is whether any allowance should be made for the three day period November 24-27, when the tug was also standing by. It does not appear that this "over-lapping" was called to the attention of the judge and he may want to take another look at this feature in the other proceedings which must be hereafter conducted by him. We believe that the employment of the shipkeepers on and after November 27th, should be treated as an "expense of justice" and entitled to perferential treatment: *New York Dock Co. v. S.S. POZNAN*, 274 U.S. 117 (1927); *THE ST. PAUL*, 271 Fed. 265 (2d Cir. 1921). Since these expenses were necessary they should be allowed. *Yokahama Bank v. Wong*, 113 F.2d 329 (9th Cir. 1940); *THE TRANSFER NO. 7*, 176 F.2d 950 (2d Cir. 1949).

## OTHER CLAIMS

China Union claims a right to payment of its own salvage expenses out of the limitation fund, on the theory that the value to be surrendered in a limitation proceeding is the value of the owner's interest in the vessel immediately after the casualty. Here, we call attention to the fact that the judge reserved ruling on this particular issue and at one time indicated that he favored the position of China

Union.[28] One of the provisions of the interloctuory decree makes it crystal clear that the judge was not passing on the issues between claimants to the limitation fund.[29] The validity of petitioner's salvage claims, including its claim for the refund of said $8,582.00, and other sums previously paid into the registry, are subject to the "further orders" of the District Court.[30]

The assessment of interest against China Union on the originally unlisted prepaid freights, was a matter within the sound discretion of the judge. Petitioner's claim that it proceeded in the utmost good faith, in withholding such freights, was a subject to be weighed and considered by the judge in charge of the proceeding. Obviously, he felt that the petitioner's action, in consistenly attempting to set off its claimed salvage charges against the amount of the prepaid freight and interest, was arbitrary and unnecessary. The record supports this assessment of interest. An allowance of interest is recognized in *LA BOURGOGNE*, 139 Fed. 433 (2d Cir. 1905); *LA BOURGOGNE (Deslions v. LaCompagnie Generale Transatlantique)*, 210 U.S. 95 (1908). Even if viewed as a penalty, the exaction of the interest under the facts in this case would be justified.

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28 Order, January 28, 1963.

29 "(3) That after payment of the Trustee's expenses, as hereinabove provided, the claim of the United States of America shall be paid as hereinafter provided, **following which any funds remaining in the registry of the Court shall remain pending further orders of this Court.**" (R. 5148.) (Emphasis supplied.)

30 China Union, whose fault was the sole cause of the casualty, may not be entitled to make a claim for salvage, THE CLARITA and THE CLARA, 90 U.S. 1, 18 (1874).

## CONCLUSION

On appeal in an admiralty case, the appellate court is bound by the findings of the trial court and they will not be set aside unless the party seeking to have them overturned demonstrates that they are not supported by credible evidence, or were induced by an erroneous view of the law. *Trinidad Corp. v. Indian Towing Co.*, 293 F.2d 107 (5th Cir. 1961), *cert. denied* 369 U.S. 861; *Ohio Barge Line, Inc. v. Oil Transport Co.*, 280 F.2d 448 (5th Cir. 1960).

On the entire record, to considerable of which we have made specific reference, we hold that the trial judge's findings were amply supported by substantial evidence, and not clearly erroneous. We have a firm conviction that each of the parties received a fair and an impartial trial. We find nothing in the brief of Lucy Duncan to justify striking the same from the file. The motion is denied. The interlocutory decree is affirmed.

BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in all of the very excellent opinion prepared for the Court by Judge Kilkenny except as to some portions in the section entitled "Assignment V" as to which I have some reservations and that part entitled "Claim Against Cyanamid" which I believe to be erroneous. As to the latter I dissent. My difference would not change the result as between BEREAN and RELIANCE, between RELIANCE'S Cargo and RELIANCE, between the injured/decedents and RELIANCE and her owners, or the denial of relief as to injured/decedents against BEREAN. It would afford RELIANCE and the injured/deceased victims the right to show that damages and injuries were caused or ag-

gravated by Cyanamid's neglect of its duties. To this extent and for this purpose, I believe the case should be reversed and remanded.

As to "Assignment V.," I accept the proposition that a shipowner is entitled to rely on the classification of the material and the stowage requirements prescribed by the regulatory agency, here the Coast Guard. There may, however, come a time when a carrier acquires so much knowledge about the peculiar characteristics of a particular cargo, which are not generally known, that it can no longer rely solely on the insulation afforded by reading and applying Coast Guard regulations which it knows in fact are either wrong or incomplete. The aim of the regulations, the aim of the law, is to promote safety, especially to the innocent third parties—crew members, longshoremen, persons on other vessels, members of the public, and others—who are likely to be exposed to the hazards of the product in its normal course of distribution, transportation, and handling. That aim is hardly achieved by an absolute which declares that a shipowner may ignore hazards not disclosed by the Regulations, but of which it knows and knows how to minimize by prudence. This is a long way from making every shipowner his own chemist, physicist, physical chemist, or the like in this day of scientific marvels and new esoteric products.

But Cyanamid is in no such favored position. It is the manufacturer and supplier of a chemical that it knows can and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It cannot rely on—and the proof does not even begin remotely to suggest that it ever did, or would, rely on—the Coast Guard. Cyanamid knows that if it—a huge industrial enterprise which proudly claims a pre-

eminence in this chemical field—relied on the Coast Guard with its limited laboratory facilities for its research and development, it would go bankrupt. The Coast Guard might come to it, but it would never, simply never, go to the Coast Guard to ascertain what the characteristics and hazards of its own product are.

So while the law affords to BEREAN the right to accept a faulty Coast Guard classification, Cyanamid can claim no such privilege. Its own published pamphlet entitled "Handling-Storage-Analysis of Acrylonitrile," introduced as an exhibit and to which the Court's opinion refers, makes it clear that it was, as Dr. Brieger testified, no less toxic than a Class B poison since it was more toxic than the test standard 5% dilution of hydrocyanic acid. Dr. Brieger had preeminent qualifications which Cyanamid never challenged—indeed could not challenge.[31] If, as the Court suggests, his testimony was guarded, occasionally hesitant, it was, as the quoted reference to autopsies (see note 23) reveals, just another clear proof of his scientific competence. Time and time again, he made plain, based upon a lifetime study and industrial experience with this very compound, that for seamen to be afloat in water having a film of Acrylonitrile on the surface[32] would mean almost certain death.[33] And that is what Cyanamid's own pamphlet re-

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31 Dr. Brieger had made tests and reports on Acrylonitrile which were submitted to Cyanamid.

32 In the collision, No. 1 port wing tank was ruptured. All of the 226 tons of Acrylonitrile spilled out into the channel.

33 Ironically the record reveals that about a year after this collision, the Master of BEREAN was killed by Acrylonitrile fumes resulting from a very small leak in the pump room. No one, certainly not Cyanamid, suggests that this post-collision event was an untoward surprise to those knowledgeable about Acrylonitrile.

flected in vivid terms.[34]

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[34] As to handling the chemical, Cyanamid explains:

> "The precautions set forth in this bulletin are the results of the experience gained in handling and storing Acrylonitrile during this period. It should be emphasized at the outset, that because of the toxic and flammable nature of Acrylonitrile, handling operations should be performed in areas which are properly ventilated and free from sources of ignition."

As to cleaning tanks in which Acrylonitrile has been stored, Cyanamid warns:

> "Protective equipment should be made available to those entering [storage] tanks. This equipment should include cover-alls, eye goggles, and gas masks. * * * The person working in the tank should be provided with a body harness with life line attached. Station a man on the outside end of the life line to do nothing but watch the worker within."

And the type of gas mask required differs with the concentration of the chemical's vapors:

> "Use this type of canister (organic vapor) **only** in locations where Acrylonitrile vapor content is less than 2% and the oxygen concentration is above 16%. Otherwise a mask with self contained oxygen or air supply **must** be employed." [Emphasis in original]

Cyanamid is the last to minimize the effects of the chemical on the human body:

> "Acrylonitrile is toxic by inhalation, by absorption through the skin, and by oral ingestion.
>
> "* * *
>
> "Poisoning by Acrylonitrile produces symptoms which are similar to those produced by hydrogen cyanide. Excessive vapor inhalation causes weakness, headache, sneezing, abdominal pain, and vomiting. Absorption of large amounts of the liquid through the skin produces similar symptoms. * * *."

And in describing the proper methods of waste disposal, the manufacturer warns of the danger to fish:

> "Acrylonitrile stream effluents should be treated to such an extent that they pose no danger to downstream public water supplies or to aquatic life. * * * Although it has been demonstrated that fresh-water fish can tolerate an Acrylonitrile level of 10 p.p.m., the actual tolerable limit

The question is not whether BEREAN was at fault in loading Acrylonitrile in skin tanks unprotected by cofferdams. The question is whether Cyanamid knowing what it does, could knowingly load BEREAN at Cyanamid's terminal knowing also that the cargo was going into skin tanks. In this respect Cyanamid had duties that transcended those it owed to Andersen or BEREAN and which, the Court supposes, it perhaps satisfied by showing the Master the blue pamphlet. It owed a duty literally to the world—at least that world within the reach and protection of American jurisprudence, land-based, salt water and amphibious. It had to have in mind port workers at the place of loading, crew members on the carrying vessel, crew members on accessorial tugs, owners and crew members of vessels with which

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will depend on local conditions and use of streams." And if that "aquatic life" happens to be seamen afloat, who will both absorb and breath vapors, "the currently accepted threshold limit for * * * an eight-hour exposure is 20 parts of vapor per million parts of air," which makes it more toxic than carbon tetra chloride (25 p.p.m.) but only slightly less toxic than hydrogen cyanide (10 p.p.m.) Nevertheless, the chemical is toxic enough so that "the regimen of treatment [by a physician] recommended for Acrylonitrile poisoning is that for cyanide poisoning."

In several places and ways the pamphlet equates Acrylonitrile with Hydrogen Cyanide (Hydrocyanic Acid). This is a Class A poison, § 146.25-5, defined as "poisonous gases or liquids of such nature that a very small amount of gas, or liquid, mixed with air is dangerous to life." As such it is listed with only 13 other poisons, three of which are military poisonous gases. And footnote 1 to Hydrocyanic Acid permits dilute solutions not exceeding 5% strength to be classed as Class B poisons. Class B covers "Poisonous liquids or solids * * * other than Class A, C or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation." § 146.25-10. Rat and rabbit ingestion, absorption and inhalation test standards are thereafter prescribed. There is no evidence to refute Dr. Brieger's testimony that Acrylonitrile would fail these tests.

the carrying vessel might come in contact by collision or otherwise, port officials, customs inspectors, immigration officers, maritime service personel, and members of the public. The duties owed to this limitless group of protectees require as a minimum that it not knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid, the manufacturer-supplier-shipper, has the liability of an insurer, but it certainly has the far-reaching awesome liabilities now associated with products liability. *Putman v. Erie City Mfg. Co.*, 5 Cir., 1964, 338 F.2d 911, Restatement, Torts §388. When the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability. Indeed, this teaching of Texas City was not lost to the industrial or judicial world because the Government as the manufacturer of FGAN escaped liability from the peculiar governmental "discretionary function" exemption, *Dalehite v. United States*, 1953, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, . . . . AMC . . . ., or the stringent limitation of the scope of the FTCA to exclude "novel and unprecedented" cases, a reading which was shortly to be repudiated. *Rayonier v. United States*, 1957, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354.

But the trial Judge never really faced up to this issue. Nor does this Court. Rather, each equates Cyanamid's obligations with those the carrying vessel BEREAN owed to others. As to the BEREAN, the Coast Guard regulations, so long as BEREAN did not know they were faulty, were an adequate insulation. But in relation to members of the public and others, Cyanamid could not fall back on the Coast Guard. The problem was really not whether the Coast

Guard classification was in error, as Dr. Brieger tried to demonstrate. Rather, it was what Cyanamid actually knew and ought to have known about its own product and knowing that, what in prudence considering these extremely high hazards could and ought to be done to minimize,[35] if not eliminate, the devastating consequences of a foreseeable casualty.

This was a basic error in approach by the District Judge. And our efforts to overcome the deficiency by questioning the standing of China Union to assert the claim and to hold as a matter of law that there could be no proof of *causation* as to the claims of the injured/deceased will not suffice. We must recall that this case, as are all extensive maritime catastrophes, was being tried in two stages—liability and damages. This is the first time, to my knowledge, for example, in which death certificates, issued generally in Texas by people whose only competence is the lowest office in the judicial hierarchy—prove the cause of death. I agree the issue has not been proved. No more so was the damages sustained by BEREAN or its cargo. That is to come later. As to China Unions' standing, at the liability phase only, who is to say that had the fumes from this lethal cargo not have been freed by rupture of the hull forming the tank sides, the action on RELIANCE might not have been different?

On this record, the Judge should have held that as against Cyanamid a prima facie case had been made out. Cyanamid should have been put to its proof to refute, if it could, the hazardous characteristics, and on what prudence would re-

[35] BEREAN had main tanks 1 through 8 divided by longitudinal bulkheads affording a series of 16 inboard tanks fully separated from the ship's hull by wing tanks on each, port and starboard, side.

quire of the manufacturer-supplier-shipper of a product of such deadly potential.[36] The Judge would then have decided whether Cyanamid had the usual land-based products liability of a chemical manufacturer. If he declared in the affirmative, proof of damages, if any—and I do not minimize the if any—would be opened for a second stage on damages.

The admiralty has led, not followed. But here salt water dilutes the responsibility now so plainly resting on the manufacturer-supplier-shipper of a commercially useful, indeed valuable, chemical compound which carries death with its utility.

I would therefore reverse for further hearing as appropriate on the claims of RELIANCE and her owners, and the injured/decedents against Cyanamid.

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[36] Indeed at this point the Coast Guard regulations might turn on Cyanamid to prescribe an absolute standard. Cf. Marshall v. Isthmian Lines, Inc., 5 Cir., 1964, 344 F.2d 131, . . . . AMC . . . . If, as Dr. Brieger so stoutly maintained, the rat tests prescribed by § 146.25-10(1)(2) (see note 34, supra) would bring Acrylonitrile within Class B poisons, then it is undisputed that for a combustible liquid having lethal characteristics and defined as a Class B or Class C poison, such cargo must be carried in tanks which are independent of the ship's hull, separated by cofferdams, etc. 46 C.F.R. § 39.01-1, .05-1. The significance of such tests would not be to establish that classifying Acrylonitrile as inflammable by the Coast Guard was erroneous as such. Rather, since a manufacturer knows what accepted tests would reveal, the significance would be to forbid the manufacturer as shipper to tender it for shipment without disclosing all these characteristics and to knowingly participate in a loading or shipment which, with such knowledge, it knows to be dangerous. Cf. 46 USCA § 170(10).

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(Caption Omitted)

(October 7, 1966)

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## ON PETITIONS FOR REHEARING

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Before BROWN and GEWIN, Circuit Judges, and KILKENNY*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above styled and numbered cause be, and the same are hereby, denied.

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* Of the District of Oregon, sitting by designation.

# APPENDIX C

## DECISION OF DISTRICT COURT

(Caption Omitted)

(Filed July 17, 1963)

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### PRELIMINARY STATEMENT

At approixamtely 11:15 p.m. on the night of November 7, 1961, the Chinese Motor Vessel UNION RELIANCE and the Norwegian Motor Tanker BEREAN were in collision in that portion of the Houston Ship Channel which crosses Galveston Bay. As a result, twelve lives were lost and certain personal injuries were sustained aboard the UNION RELIANCE. Both vessels were damaged and damage was done to the cargo aboard each vessel.

Both vessels caught fire, though the fire aboard the BEREAN was extinguished within a matter of a few hours. The UNION RELIANCE remained ablaze and at anchor, blocking the Houston Ship Channel at a point close to Buoy No. 73. On November 10, 1961, while still ablaze to such extent that no one could board her, the UNION RELIANCE was towed by the United States Corps of Engineers to Galveston Harbor, where she was anchored.

### THE LITIGATION

Shortly thereafter, the United States of America filed her libel *in rem* against the UNION RELIANCE seeking the immediate sale of the vessel and the recovery of the expenses incurred by the United States in removing her from the Houston Ship Channel and for safeguarding her while at anchorage. Shortly thereafter, China Union Lines,

Ltd., owner of the UNION RELIANCE, filed its petition for exoneration or limitation of liability; and on November 29, 1961, obtained the customary order from this Court prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding.

In connection with its petition to limit, China Union Lines elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. Ben G. Sewell, Esq. was appointed Trustee and entered upon his duties. Upon the recommendation of proctor for petitioner, and a need therefor appearing, the Court appointed J. R. Bencal, a competent and experienced marine surveyor, (and who had been employed in that capacity to represent petitioner's interest from the inception) as salvage master, and authorized such salvage master to undertake the steps necessary to extinguish the fire in the vessel's holds and to bring her into port for the purpose of discharging her remaining cargo preparatory to sale.

Meanwhile, in other procedings in this Court, China Union Lines had filed its libel against the BEREAN. Her owner, A. O. Andersen & Co., Inc., appeared, claimed the vessel, answered and cross-libeled against China Union Lines. The owners and underwriters of the lost and damaged cargo aboard UNION RELIANCE filed their libel against BEREAN and her owners. Similarly, American Cyanamid Company, the owner of the only cargo lost aboard BEREAN, filed its libel against UNION RELIANCE.

The officers and members of the crew of UNION RELIANCE who were killed or injured all were Nationals of the Republic of China. The Consul of that government, residing in Houston, sought to recover for these injuries and deaths, against both vessels. Also killed as a result of

the collision was the Houston Ship Channel Pilot (Captain Duncan) aboard UNION RELIANCE, whose widow, Lucy Duncan, has made claim against UNION RELIANCE and her owners.

Thereafter came several claims by owners of ships which allegedly were delayed by the blocking of the Houston Ship Channel for a period of some two days.

Additionally, China Union Lines, and the owners and underwriters of the cargo aboard UNION RELIANCE and various other parties filed separate libels directly against American Cyanamid, as owner of the cargo of BEREAN. It was the theory of these libels that the acrylonitrile carried by BEREAN, and which had spread, caught fire, and ignited the two vessels, was of such dangerous nature and propensity as to render the owner-shipper liable to the injured parties.

## PRE-TRIAL DEVELOPMENTS

Pursuant to the order of the Court appointing him salvage master, J. R. Bencal, working in close connection with proctor for petitioner, secured equipment and services with which he was able to extinguish the fire aboard UNION RELIANCE. Thereafter she was brought into the port of Galveston, her cargo was discharged, and she was made ready for sale. Under order of Court, the remains of the vessel were sold by the Trustee for a gross price of approximately $109,000.00.

Thereafter application was made to the Court and to the Trustee for the immediate payment from these proceeds of sale for services and materials furnished at the request of the salvage master. Petitioner sought to be reim-

bursed for sums expended in this fashion. The United States sought to recover its expenses in moving and safeguarding the vessel, as salvage claims. The firemen, and those furnishing the equipment used in combating the fire, made similar claims. After one or more hearings with respect thereto, this Court entered an order on March 12, 1962, by which provision was made for their disposition. That order was made the subject of an interlocutory appeal which originally was allowed by the Court of Appeals for the Fifth Circuit. After hearing, however, the order allowing the appeal was vacated and the cause remanded to this Court for further proceedings (306 F.2d 135). Thereafter, extensive hearings again were held by this Court resulting in the order of January 28, 1963, directing the immediate payment of certain salvage claims, and deferring the payment of the remainder of such claims pending a decision on the issue of liability.

This maze of litigation was consolidated, and the pleadings amended so as properly to tender to the Court all issues of liability.

## THE TRIAL

Trial on the issue of liability alone commenced March 11, 1963, and proceeded until April 12, 1963. The Court heard witnesses from among the officers and crews of each vessel, and others, and received voluminous documentory evidence. At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence

produced by petitioner. The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against that respondent.

## FINDINGS OF FACT

*The Vessels and Their Owners*

1. The petitioner in limitation, China Union Lines, Ltd., is a private corporation organized and doing business under the laws of the Republic of China, having its principal office in Taipei, Taiwan.

2. The UNION RELIANCE was a steel motor ship, 496 feet in length, designed for the carriage of dry cargo, built in the United States in 1940. Having served several owners under several flags, she was purchased from Greek nationals by China Union Lines, Ltd., in April, 1961.

3. UNION RELIANCE was one of only four vessels constructed in the same yard and at about the same time, with main engines of this type. She was fitted with four diesels, controlled in pairs, and equipped with electromagnetic couplings, through which the power of either or both pairs, operating either ahead or astern, could be transmitted to the propeller shaft. These engines were designed to give 240 engine revolutions per minute, and, with a 3-1 gear ratio, to give 80 revolutions of the shaft per minute. As will be noted more in detail hereafter, however, by reason of age, wear and poor maintenance, at all times material to this proceeding, the engines were not capable of approaching this efficiency.

To change the direction in which power is imparted to the propeller shaft (that is, if the propeller is driving the vessel forward, and if it is desired to impart astern power), it was necessary to stop the engines by cutting off the fuel supply, to change the cam setting, and to restart the engines.

With all four engines operating at or near design efficiency, one pair of engines normally produced sufficient power, and revolutions of the shaft, for routine harbor maneuvering. Hence the design permitted—and contemplated—one pair of engines to be kept running ahead, and the other pair kept running astern at all times while the vessel was in pilot waters. Thus the engineer could reverse the direction of the screw by a simple maneuver of uncoupling one set of engines, and coupling on the others. When desirable, all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was not a difficult or time consuming operation, and could be accomplished by competent engine room personnel in a matter of approximately one minute.

4. The UNION RELIANCE was equipped with a hydraulic steering system, located in the steering engine room (to be distinguished from the engine room, where the main engines were installed). Hydraulic rams served to move the rudder in the desired direction. Hydraulic fluid (or telemotor oil) under great pressure actuated the rams.

Two separate and distinct steering systems were available to force the hydraulic fluid, under pressure, through the system and against the rams. These were used alternatively; while one was in use, the other served as standby.

The principal component of each such steering system was a large pump. The pump was powered by a 50 horsepower electric motor. There were a number of auxiliary pumps and motors, of particular relevance here being a small so-called "replenishing pump."

In normal operation, hydraulic fluid escaped from the system and was collected in a sump tank. It was then lifted by means of this replenishing pump to an overhead replenishing tank, from which point it was fed back into the system for further use through gravity. The replenishing pump was powered by a one horsepower electric motor.

Some 35 gallons of hydraulic fluid were required to fill each system. While some minor leakage was expected, in normal operation it should have been necessary to add only small quantities of fluid at infrequent intervals.

5. The BEREAN was built in Norway and delivered to her owner and operator, A/S A. O. Anderson & Co., a Norwegian corporation, in April, 1961. She is 508 feet long. 65 feet in beam, powered by one 9000 horsepower diesel engine. She has no midships house; her navigating bridge is in the forward part of the after house, some 350 feet from the bow.

6. The cargo space of the BEREAN is divided into 42 tanks. She is designed and equipped to carry many varieties of bulk liquids. Some tanks are stainless steel lined; others are equipped with heating coils for handling viscous liquids, etc. She had been engaged in the chemical trade during the several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The shell of the ship constitutes the outer wall of certain of her wing tanks. There were no

protective cofferdams or protective voids surrounding such tanks. Under pertinent Coast Guard regulations, those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics", under 46 C.F.R., Part 39.

*The Cargoes and Movements Preceding the Casualty*

7. Following her purchase from Greek interests, UNION RELIANCE sailed from Piraeus, Greece, through the Mediterranean and to the United States, calling at Tampa, Florida, and New Orleans, Louisiana. By this time her Captain and crew had discovered that extensive repairs were needed in the engine room, the most immediate need being for an overhaul of the engine control mechanism. A marine surveyor and engine expert one Spindanger, together with an officer of petitioner, flew from New York to New Orleans to supervise these repairs. While these repairs to the engine controls were underway, each of the four main engines was opened, and the cylinder heads were found badly worn and eroded. Replacements were not readily available and the old cylinder heads were re-installed. Spindanger made a full report to the owners of the work which he had accomplished, and of other work which he recommended, to place the engine room in proper condition. While the New York office of petitioner was aware of the contents of this report promptly, it was not received in Taiwan until after the collision.

On departing New Orleans, UNION RELIANCE proceeded to Houston, thence through the Panama Canal, up the Pacific Coast, and thence to Japan and Taiwan. Additional engine repairs were accomplished in Taiwan.

Her Captain, chief engineer and others of her complement were replaced, and the officers and crew who were aboard at the time of the casualty took over the vessel in Taiwan. She loaded a general cargo there and in Japan for carriage to the United States. She discharged a part of this cargo at Los Angeles and received aboard at that port five of the large number of piston heads which were needed for her main engines. However, these were never installed prior to the collision. From Los Angeles, she proceeded through the Panama Canal en route to Gulf Ports.

8. The UNION RELIANCE arrived in Houston November 5, 1961, discharged a portion of her cargo and left the Houston dock at 6:30 p.m. November 7. She proceeded seaward, unassisted by tugs, and with Houston Ship Channel Pilot Duncan on her bridge. She was drawing approximately 16 feet 8 inches forward and 23 feet 5 inches aft.

9. At approximately 8:30 p.m., while UNION RELIANCE was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system which was in use at the time. The engines were stopped, the anchors dropped, and the vessel brought to rest. The starboard steering system was disconnected, and the port system connected. It was tested by turning the wheel a number of times, and the rudder indicator showed that the rudder responded, and that the port system was operating properly. The anchors were lifted and the vessel again got underway. This was at about 9:00 p.m.

Repairs were promptly undertaken on the starboard steering system. It was found that a brush holder on the 50 horsepower electric motor which operated the starboard steering pump was defective. The chief electrician under-

took to repair the damaged part and had done so, but had not replaced the part in the engine. Hence the starboard steering system was not in operating condition from that moment forward.

The UNION RELIANCE proceeded outward from this point with the port steering system apparently functioning properly until shortly before the collision.

10. On November 6, 1961, the BEREAN loaded 14 tons of acrylonitrile at Good Hope, Louisiana. Upon the direction of the officers of the vessel, this shipment was placed in the forwardmost cargo tanks of the BEREAN, being No. 1 port, No. 1 center, and No. 1 starboard.

11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. Acrylonitrile is and was at the time of the casualty classified under pertinent Coast Guard regulations as a Grade C flammable liquid (46 C.F.R. 146.21-100), as is gasoline, benzine, naptha, etc. It is not classified as an "extremely dangerous poison", nor as a "less dangerous poison" (46 C.F.R. 146.25-5; 146.25-10).

12. The BEREAN arrived at the Galveston Bay at approximately 9:15 p.m. on November 7, 1961. In addition to the acrylonitrile mentioned above, BEREAN carried a mixed cargo of bulk liquids. She was drawing 19 feet forward and 25 feet aft. Houston Ship Channel Pilot Lary

boarded the BEREAN in the vicinity of the sea buoy and assumed active control of her navigation as she was proceeding inbound toward Houston.

13. From the sea buoy to the point of the collision and beyond, the Houston Ship Channel passes through the open and unobstructed waters of Galveston Bay. The channel has a dredged width of 400 feet and depth of 36 feet. Crossing Galveston Bay, the channel is relatively straight. When weather conditions are favorable, it is the custom and practice of most vessels to navigate this portion of the channel at "full ahead", except when passing other ships.

From Morgan's Point inward to Houston (being that portion of the channel which the UNION RELIANCE had navigated prior to the collision), the channel is more tortuous; there are many shoreside installations. Thus a vessel is required to maneuver to a far greater extent than in that portion of the channel outward from Morgan's point.

14. During the course of her passage from the sea buoy to the point of collision, Pilot Lary, her second mate (Haugen) and a helmsman were on the BEREAN's bridge at all times. Her captain (Larsen) was on the bridge a majority of the time, although he had repaired to his cabin shortly before the emergency presented itself, and returned to the bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour, and it was his duty then to proceed to the bow of the ship to serve as lookout for an hour, before returning to duty at the wheel. However, the practice was followed on the BEREAN, when weather and visibility were favorable and the vessel was pro-

ceeding routinely, to permit the helmsman a 10-15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose.

Both bow anchors of the BEREAN were ready to be let go, but BEREAN had no one standing by the windlass to serve as anchor watch. By reason of the nature of the channel in that area, as set out above, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point.

15. The collision occurred in the Houston Ship Channel at a point between Five Mile Point and Red Fish Reef. At Five Mile Point (Beacons 75 and 76), the Ship Channel requires a turn of about 15 degrees to port from an outbound vessel, as was the UNION RELIANCE. From the point of this bend, to the scene of the collision and beyond, the channel is straight. Buoy 73 is located on the west side of the channel approximately seven-tenths of a mile below Beacon 75. Beacons 71 and 72 are located opposite one another, at a point approximately seven-tenths of a mile below Beacon 73.

16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour.

17. UNION RELIANCE was navigating at a speed of 9-10 knots over the ground when she made the bend at Five Mile Point. Each vessel saw the lights of the other at about this time. BEREAN blew a one blast signal, which was not answered by UNION RELIANCE.

18. In negotiating this turn, UNION RELIANCE navigated somewhat to her starboard side of the channel, and away from the center line of the channel. This was noted and commented upon by the pilot of the BEREAN. This maneuver was of little consequence, however, and did not cause the vessel to sheer away from the starboard bank, did not cause loss of control of her steering, and did not precipitate the casualty (as is contended by petitioner).

19. In negotiating the turn in the channel to her port, the UNION RELIANCE pilot ordered her rudder 5 degrees to port. This was at approximately 11:10 p.m. The rudder responded to this movement of the wheel, and the vessel started her turn to port. However, at this point the steering gear of the UNION RELIANCE failed with the rudder in the 5 degree port position, and she continued to swing under that rudder setting. The quartermaster was unable to move the wheel in either direction. She never straightened her course thereafter.

20. When it became evident to the Captain, the pilot, and quartermaster that the wheel would not respond, by engine order telegraph the bridge notified the engine room to reduce speed, and shortly thereafter to stop. The third mate, who was on watch, was ordered by the Captain to search out the chief engineer and advise him of the rudder failure. The engine room was ordered to give full speed astern to the engines.

21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE.

22. Efforts to transfer the steering control on the bridge of the UNION RELIANCE from the telemotor system (which had been in use) to the gyro-pilot was unsuccessful, and UNION RELIANCE continued to swing to her port out of control. Prior to the emergency, UNION RELIANCE's four engines had all been coupled in the ahead position for maximum forward speed. On receiving the order for full power astern, the engine room undertook to, and did, reverse one set of two engines, and coupled same to the propeller shaft to give astern power. Nevertheless, the vessel continued in her swing to port with some headway. The remaining two engines were never reversed and coupled to the shaft, for reasons which will be noted hereafter.

UNION RELIANCE continued to have headway until she collided with the port side of the bow of the BEREAN at 11:13-1/2 p.m.

23. The pilot of the BEREAN observed the UNION RELIANCE as she was in the turn of the channel mentioned above, and about 3 miles away. Prior thereto, BEREAN had been navigating at "full ahead" and was making 13 to 14 knots. On observing UNION RELIANCE coming out of the bend, at approximately Beacon 75 and 76, BEREAN's speed was reduced to "half ahead" and shortly thereafter to "slow ahead". It was at this time that the one blast signal was given by BEREAN. While it was not answered, the BEREAN pilot expected to make a normal port to port passing.

The pilot of the BEREAN noted, and comented to the watch officer, that UNION RELIANCE was somewhat closer to her starboard bank of the channel than was necessary or customary in making the bend. They watched her

swing to her port, and became somewhat apprehensive. BEREAN turned slightly to her starboard, expecting to negotiate the port to port passing. However, a three blast signal from UNION RELIANCE was heard, and the sound of the anchor letting go was heard at approximately the same time, and the pilot of the BEREAN imediately recognized that an emergency presented itself. He blew three blasts in return, and immediately ordered full speed astern on the BEREAN's engines and gave her hard right rudder, intending to put her aground in the mud bank at the side of the channel. These orders were complied with. At this time, the vessels were approximately one-fourth mile apart, and were closing on each other.

24. At this time, and since 11:00 p.m., the BEREAN had been without her regular bow lookout. This resulted from the fact that at 11:00 the lookout had returned to the bridge to relieve the seaman at the wheel. The helmsman, before going forward to assume the bow lookout, was directed to fetch coffee for those on the bridge and was engaged in doing so during this interval.

25. The BEREAN had no one standing by to drop her anchors. When the BEREAN pilot recognized the emergency condition of the UNION RELIANCE (when he ordered the engines full astern, the hard right rudder), he likewise ordered the starboard anchor dropped. The watch officer who was on the bridge with the pilot immediately went forward for the purpose of letting go the anchor. However, before he reached the bow, the watch officer felt BEREAN go aground in the mud, and observed UNION RELIANCE bearing down upon the port bow of his vessel in such fashion that he recognized that a collision was in-

evitable. HENCE he did not continue forward, and did not let go the BEREAN anchor, but returned to the bridge.

26. BEREAN ran aground into the mud on her starboard side of the channel immediately before or about the time of the impact. She had little, if any, headway, though the violent wheel maneuver and her efforts to stop caused her stern to swing somewhat to port and across the channel. The bow of the UNION RELIANCE struck BEREAN on her port side somewhat behind her stem. The UNION RELIANCE had lost most of her speed at this time. The impact was not severe, and injured no one. It was hardly felt in some portions of the two vessels. However, the bow of UNION RELIANCE breached the No. 1 port tank of BEREAN, causing its acrylonitrile cargo to become ignited and to explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited. The vessel continued to burn for several days, as noted above, and she became a constructive total loss.

27. As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew.

*Fault and Negligence*

28. The primary and direct cause of the collision was the failure of UNION RELIANCE to keep to her starboard

side of the channel. This resulted from a failure of her port steering system (her starboard steering system having previously failed) and constituted a violation of the provisions of 33 U.S.C.A., Sections 203 and 210. This constituted fault and negligence on the part of UNION RELIANCE. [1]

29. By reason of the extensive damage to the entire bridge, the wheel, and that portion of the telemotor system on the bridge caused by the fire, the cause of the steering failure cannot be determined with as high a degree of certainty as is desired. However, the steering engine room was not damaged. From the evidence which I consider most credible, and the most likely circumstances, it appears, and I find, that the failure of the port steering system resulted from a loss of hydraulic fluid; and the loss of hydraulic fluid, in turn, was caused by the failure of the one horsepower electric motor which powered the replenishing pump for the port steering system.[2]

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[1] There was much testimony on the trial from both sides attempting to explain the movement of UNION RELIANCE to her port and across the channel. Petitioner's theory was that she had approached too close to her starboard side of the channel and, by reason of suction caused thereby, she had sheered to her port; was never able to right herself; and continued the sheer completely across the channel. This is supported by a little more than (1) evidence that she did in fact approach closer to her starboard bank than was customary, (2) a suggestion from the pilot of the BEREAN that this might have caused her to behave in this manner. There is no substantial evidence that this in fact did cause this movement; while there is uncontradicted evidence from all of the officers and members of the crew of UNION RELIANCE who were in position to know, that her steering system failed.

[2] In normal operation, telemotor oil leaks from the main pump into a sump tank. The oil is lifted from the sump tank to an overhead tank, from which it again goes into the system by gravity flow. Thus, if the replenishing pump is not operative (or if the electric motor which powers it is not operative) in a matter of a few hours the oil in the system is exhausted, the system be-

30. The failure of the small motor powering the port replenishing pump was due to the fact that a fuse was burned out in the electrical lines serving that motor. This occurred in all probability when the port steering system was put in operation following the original steering failure at about 9:00 p.m. This resulted from the fact that the chief electrician made use of a certain wooden block to circumvent the safety and protective feature of an electric solenoid in the electrical system serving this motor.[3]

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comes filled with air, and the rams do not cause the rudder to respond.

This explanation is strongly supported by the uncontradicted testimony that on the occasion of the joint survey the port system was practically devoid of hydraulic fluid, and when power was applied, moved erratically, if at all; but that after some 30 to 35 gallons of telemotor oil was added, it operated properly. I am convinced that this loss of fluid resulted prior to the collision and was the cause of the steering failure. I am unable to accept the explanation offered by petitioner that the oil leaked out after the collision and before the survey.

[3] As in the preceding finding, the evidence does not conclusively show the cause of this failure. I credit, however, the following testimony.

Shortly before or in the course of the joint survey, a fuse was found to be burned out in the electric circuit which controlled the one horsepower motor serving the port replenishing pump. There is no direct evidence as to when the fuse was blown. However, from the time the vessel was received from its Greek owners, the chief electrician had made use of a wooden block to prop and secure in place an electric solenoid in the electric circuit serving this motor (another block was used in a similar fashion in another line). This solenoid was designed to protect the motor from the full surge of electrical current when the motor is switched on, and to permit the current to be applied gradually. If an unduly heavy surge of current passed through the line, the solenoid was designed to drop open, breaking the circuit, and protecting the motor. The wooden block held the solenoid in place and thus rendered the protective feature inoperative. This was

31. The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost con-

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calculated to cause a blown fuse when this motor was engaged. Had this occurred at about 9:00 p.m. and the system not been replenished with hydraulic fluid, the fluid well might have been exhausted, and the system inoperative, by 11:00 p.m.

This testimony as to the blown fuse came from the witness J. R. Bencal and the following circumstances surrounding this testimony should be noted. Mr. Bencal is a recognized and, I believe, highly regarded marine surveyor in the Port of Houston. As stated earlier herein, he was employed almost immediately following the casualty by the petitioner and undertook to represent petitioner's interest throughout. He was in charge of the team of surveyors representing petitioner at the joint survey (which included Spindanger, an expert on the main engines, and Tarabochia, an expert on hydraulic steering systems). As stated heretofore, Bencal was appointed by the Court as salvage master at petitioner's suggestion, and by reason of his services in this regard in extinguishing the fire, his early examination of the vessel and her cargo, he was probably more familiar with the situation which prevailed aboard UNION RELIANCE following the casualty than any other individual. He was not called as a witness by petitioner. When he likewise was not called as a witness by the respondents (who obviously were fearful of being bound by his testimony), the Court summoned Bencal as a witness and advised all parties that they might cross-examine, and not be bound by his testimony. It was he alone who has testified as to the blown fuse of the electric motor mentioned above. As his memory had been refreshed from notes made at the time and the report written to his principals shortly after the joint survey, I find no reason why his testimony on this point should not be accepted.

stant difficulties encountered with the main engines, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction.

32. The UNION RELIANCE was unseaworthy from the inception of the voyage in which she was engaged, by reason of the incompetence and inability of her Captain, chief engineer, and other crewman to operate and maneuver UNION RELIANCE properly, efficiently, safely, or within her full potential. Specifically, I find that neither the Captain nor chief engineer was aware of the fact that all four of her main engines might be coupled astern. There was no agreed signal whereby the bridge could order the engine room to couple all four engines astern. By reason of this lack of knowledge, only half of the potential backing power of UNION RELIANCE was applied in an effort to stop her forward movement before the collision. Additionally, the Captain was unaware that reverse power might be applied in a very short time (probably a matter of one minute) if the engine room crew operated efficiently.[4]

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[4] It is clear from the evidence that neither the Captain nor the chief engineer was aware that the four engines might all be coupled astern, and thought that only two might be so utilized. Spindanger testified that at the time of the repairs at New Orleans on her first voyage, he had explained fully to the engineering officers and crew how to change the engines from ahead to astern; how all four engines might be so utilized; and that the whole operation would take probably one minute. The Captain and chief engineer of that voyage were relieved in Taiwan, and replaced by Captain Shu and chief engineer Hsu Bah. The new chief engineer had never before sailed on a vessel with a similar four-engine arrangement, and had received instructions from his predecessor only during the course of a one day voyage.

On entering the Houston Ship Channel some three days before the accident, the Captain told Houston Ship Channel Pilot Collie

33. UNION RELIANCE was at fault in failing to make use of all four engines in going astern immediately prior to the collision. Had the additional astern power been applied, it is highly likely that the collision would have been avoided.

34. The telephone communication system between the bridge, the engine room, steering engine room, etc. aboard the UNION RELIANCE was inoperative. While the bridge might give signals to the engine room by means of the telegraph, there was no other means of communication except (as was done shortly before the collision) to send a messenger, or to station a man with a megaphone midway between the bridge and steering engine room, to relay messages. This obviously made the transmission of messages more difficult and slow, and decreased the efficiency of the vessel.

35. The fault and unseaworthy condition referred to in the preceding paragraphs were the result of petitioner's failure to exercise due diligence to make the UNION RELIANCE seaworthy, and the failure to equip her with a competent and experienced crew. The collision and losses resulting therefrom were occasioned with the privity and knowledge of petitioner.

36. The BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 p.m. until the time of the collision. On most careful consideration, I find that

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that if all four engines were hooked up ahead (as was done to get maximum speed and power in crossing the Galveston Bay portion of the channel), it would require 10 to 15 minutes before any astern power could be applied. Shortly before the collision, the Captain told Houston Ship Channel Pilot Duncan that about 10 minutes would be required to give astern power when the four engines were coupled ahead.

this failure did not, and could not have caused or contributed to the collision. This is so because Pilot Lary saw the UNION RELIANCE several miles away; observed her lights constantly thereafter; and by reason of his knowledge of and familiarity with the channel, he recognized that she was in difficulty at the earliest moment which circumstances permitted. He heard the only whistle signals given by UNION RELIANCE, and took immediate action. A lookout could have done nothing more.

37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger.

38. BEREAN was not negligent or at fault in traveling at the speed which she was making prior to the time that she observed UNION RELIANCE and slowed her speed for the anticipated passing.

39. BEREAN was not at fault in failing to have an anchor watch prior to and at the time of the collision. It is not the custom of ships to maintain an anchor watch in this portion of the channel, particularly when the vessel has sufficient power to maneuver readily. Additionally, I find that had the anchor of BEREAN been dropped when her pilot ordered, it would have had little, if any, effect in slowing the vessel under the circumstances which then prevailed, and would not have averted the collision. BEREAN took the quickest and most certain method of losing her headway by running aground.

40. BEREAN was not at fault in carrying acrylonitrile cargo in her forward wing tanks. She violated no Coast

Guard regulation by doing so, and I find this was not a negligent or careless manner of loading.[5]

41. BEREAN was not at fault in failing to go to port to undertake a starboard to starboard passing. She had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed within which such passing might have been accomplished safely, if at all.

42. The Captain and chief engineer of UNION RELIANCE were negligent by reason of their failure to familiarize themselves with their vessel and her engines and their failure to make proper use thereof prior to the collision. This negligence constituted a proximate cause of the collision. Any recovery in favor of the Captain and chief engineer will be reduced by fifteen per cent (15%).

43. The chief electrician of UNION RELIANCE was guilty of negligence in failing properly to inspect and maintain the electrical equipment and circuits in the steering engine room of his vessel. This constituted a proximate cause of the collision. Any recovery in favor of the chief electrician should be reduced by twenty-five per cent (25%).

44. The services rendered to the UNION RELIANCE while she was at anchor in Bolivar Roads, and subsequent thereto, by the United States were, in the light of circum-

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[5] While petitioner offered evidence tending to show that a greater safety factor would result if there were inner lining of the tank so that an air space was maintained between the skin of the ship and the outer wall of the wing tanks, these experts conceded that it was the custom and practice to carry gasoline and other inflammable and explosive liquids in tanks immediately adjacent to the skin of the ship.

stances then existing, reasonable and necessary; and the charges made therefor reasonable in amount and consistent with charges generally made for similar services in that vicinity.

45. Certain speed and performance tests were made of the BEREAN shortly prior to the trial. The purpose was to show how she would react under conditions similar to those which existed at the time of the collision. The tests were made in the area in which the collision occurred. Evidence of these tests was received subject to objection. On careful consideration, I am of the view that these tests were not made with a sufficiently high degree of accuracy, and were not sufficiently consistent within themselves, to be of any probative value. Hence this evidence has not been considered.

46. From the foregoing findings, it is apparent that in general the Court has adopted the theory and the contentions of BEREAN, and rejected those of UNION RELIANCE. It is felt that the foregoing findings are supported by a clear preponderance of the evidence. It should be noted, however, that on many of the issues the evidence is in sharp and irreconcilable conflict. In weighing the evidence, notice was taken of the fact that several of the principal witnesses of petitioner were impeached regarding matters of great importance. Note is made of the following examples:

(a) Some 48 hours following the collision, as the senior surviving and uninjured officer of UNION RELIANCE, the third mate was directed to prepare a report of the casualty for his company. He did so in longhand. While the Captain was hospitalized with

severe burns, this report was read to him and received his tacit, if not express, approval and in due course was forwarded to the company. In early pre-trial procedures when extensive exchange of documentary evidence between the parties was had, this report was withheld by petitioner. It was only after trial had begun, and after strenuous efforts by proctor for petitioner, that this document was secured from Taiwan. I am of the view that it was deliberately withheld. This report was inconsistent with the theory advanced by UNION RELIANCE in a number of important respects.

(b) At the original Coast Guard hearing, a few days following the casualty, the chief engineer of UNION RELIANCE testified that his vessel had been using only two engines in running ahead, with two engines standing by to use for astern power. Thereafter the engine room bell book was recovered which showed to the contrary. He changed his testimony thereafter.

(c) The explanation of the chief electrician of UNION RELIANCE regarding his use of the wooden blocks in the starter boxes was entirely unsatisfactory. This is particularly so as he testified that the block in question controlled the replenishing pump motor on the *starboard steering engine* (which, of course, was not in use immediately prior to the collision). Testimony of all of the surveyors showed conclusively that it controlled the replenishing pump motor on the *port* steering engine.

## CONCLUSIONS OF LAW

1. This Court is vested with jurisdiction of these proceedings.

2. Petitioner China Union Lines, Ltd. is not entitled to exoneration from or limitation of its liability with respect to the claims made against it.

3. The UNION RELIANCE was grossly at fault, and in violation of the statutes mentioned above, and she and her owners are held solely responsible.

4. The only fault of the BEREAN having been one which did not and, under the circumstances, could not have contributed to the collision, A/S Andersen & Co., and the BEREAN *in rem* are not liable to any of the libelants who have made claims against them, and are exonerated and freed of liability in these actions.

5. China Union Lines, Ltd. is not entitled to recover any expense from its cargo as general average.

6. China Union Lines, Ltd. is liable to American Cyanimid Company for loss of its cargo aboard the BEREAN.

7. China Union Lines, Ltd. is liable to Lucy Duncan, surviving widow of Houston Ship Channel Pilot Duncan, for his death resulting from the fault and negligence of petitioner.

8. China Union Lines, Ltd. is liable to the legal representatives or next of kin of the members of the crew of UNION RELIANCE who were killed as result of the casualty; and to those members of the crew who received personal injuries or loss thereby, subject to the reduction by reason of their own negligence as set out in the preceding findings.

9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States.

Done at Houston, Texas, this 17th day of July, 1963.

BEN C. CONNALLY
Ben C. Connally
United States District Judge

## APPENDIX D

Testimony of Pilot Charles C. Lary, Jr., of the MV BEREAN regarding the position of the UNION RELIANCE in the bend of the Channel in the vicinity of Beacons 75 and 76.

On direct examination by Mr. Harmon (R. 3544-3545):

"Q. All right. Did you see the UNION RELIANCE at the time she was in the vicinity of 75 and 76?

A. Yes.

Q. All right, sir. Will you just tell the judge in your own words, Captain, where you were at that time, and what you saw happen on the UNION RELIANCE, and what you did on your ship?

A. Well, after passing through 71 and 72, I saw this ship coming in the bend, Judge, at 75 and 76, and she was getting—you have got a set of green ranges right above 75 and 76, and I could see him go past those ranges, and I noticed that if he didn't swing pretty quick, he was going to go to that bank, to the west bank over toward 75."

Testimony in conjunction with the marking of the graph paper diagram—BEREAN Exhibit 63 (R. 3546-3547).

"Q. If you will, mark where she was at the time you were first able to determine—using this cardboard and this green pencil, mark where she was at the time that you saw her coming into the bend.

A. Well, the best I recall, she came on, because she passed—it looked like to me when she came through these

two beacons she was starting, you know, to this side of the channel (indicating).

Q. Yes.

A. Something like that; and she came on—Mr. Eikel: Now, for the record, let's show that he marked the starboard side of the ship at that time.

A. (Continuing) Well, say the starboard side of the ship to the starboard side of the channel."

Further testimony regarding marking of the diagram—BEREAN Exhibit 63 (R. 3548-3549).

"The Court: To be sure I understand, that's where you were when you first saw the UNION RELIANCE pull to the right-hand side of the channel?

A. Yes, sir, when I—when she came in here and started across those ranges, I made the remark to the mate on watch, I said, 'That ship's getting over too far,' you know what I mean? In other words, he was going to have to swing her pretty good to bring her back on the ranges, and I saw him going, and then I could see him cross the ranges; you could see the top range as he went by—

The Court: Well, I'm not interested in that so much as where you were and where he was, so that I can kind of orient myself with your description. But you—

A. This is where I was—

The Court: Let me tell you what I want, please, sir.

A. Yes, sir.

The Court: Show me where the BEREAN was when the UNION RELIANCE was at the very beginning of your green mark, that is, close to 75 and 76.

A. Well, I'd say she was starting—what I am talking about was whenever she was coming by these beacons.

The Court: All right; back up a little bit. Show us where the BEREAN was when you saw the UNION RELIANCE at Beacons 75 and 76.

A. All right, sir (indicating).

The Court: All right. Start your mark there, and show us what your vessel did up to the point of collision.

A. All right, sir.

Q. (By Mr. Harmon) Yes; draw a line there, Captain, and show what your ship did, now.

A. Well, I stayed in the middle, watching him, up to a point, I don't know just exactly, something like this (indicating), and then I changed the course, I think it was—either I changed it to 148 or 149, two or three degrees to the starboard. In other words, I brought it on over like this (indicating), something to that effect.

Q. All right, sir.

A. And roughly in this area, I'd say right here, as we were about roughly, I'd say, six-tenths of a mile apart, well, I heard his anchor chains going and I put her full astern."

On cross-examination by Mr. Eikel, Captain Lary testified as follows (R. 3587-3591):

"Q. Now, Captain, from your—I have asked you this question before, on your deposition, and you were asked the question generally: You have testified now before the Coast Guard and here and this deposition. It was your opinion that this ship was too close to that bank, and

sheered off that bank; that is what caused her to come across, is that right?

A. The reason for the collision?

Q. Yes, sir.

A. She was over on that side, and she come off, yes, sir. I have stated that.

Q. And you have testified that she sheered off that bank; isn't that what you said?

A. That's right, she came off that bank.

Q. Well, you testified that she was too close to that bank, and that is what caused her to come off that bank, the sheer, isn't that right?

A. Yes, that's what I have said.

Q. And that was your opinion before the Coast Guard, and you reaffirmed that opinion in February when we took your deposition?

A. That's right.

Q. And that's still your opinion, is that right?

A. That's right.

Q. And the way you arrived at that opinion was that you saw both those range lights to the east of the UNION RELIANCE as she made that turn at 75-76 buoys or beacons, isn't that right?

A. That's right.

Q. And you testified positively before that you saw both those range lights which mark the center of the channel, of course, and they were clear of the ship's lights when she was making that bend at 75-76, isn't that correct?

A. In other words, the ship was to the west of the—

Q. Of the center of the channel?

A. Of the center of the channel at that time?

Q. Yes, sir.

A. That's right.

Q. And you could see her lights plainly, and you could see the range lights plainly?

A. That's correct.

Q. All right, sir. And that is fundamentally the real reason why you think she sheered off that bank, isn't that correct?

A. That's correct.

Q. Yes, sir. And you testified, at the time of taking your deposition, that you remarked to the mate, and you testified before the Coast Guard, "She is going to have trouble, because she is too close to that bank," isn't that right?

A. Well, I said she was not—I was concerned that she—

Q. Yes, sir.

A. I think I made the statement to the second mate.

Q. All right, sir. And you testified to that statement?

A. I said, 'That ship's getting over too far,' something to that effect.

Q. Yes, sir. And you testified on your deposition that you had been here yourself, and you knew that a ship over that far would in all likelihood sheer; isn't that correct?

A. That's correct.

Q. Yes, sir; and you thought so that night when you first saw her getting over too close, at the time she was passing beacons 75 and 76, isn't that right?

A. That's the reason I dropped my speed to dead slow.

Q. Yes, sir. And where were you when you dropped your speed to dead slow? Will you tell me that, now?

A. Well, I was between that, where it says W and A.

Q. Well, what about this mark X, the second one from the W on that side of the W? Were you there, or not?

A. Well, I think the first X is where I dropped her down to half, and then the Judge wanted the other one when I—I mean the half and slow, and I think right around in there was where I dropped her to dead slow.

Q. You actually dropped her from full ahead to half ahead, to slow ahead, and dead slow ahead, in about a minute or less than a minute, isn't that correct?

A. Something like that, yes, sir.

Q. Yes, sir. And so it was there when you realized, as you have just testified, that this ship was in here too close to the bank, and she was likely to sheer; isn't that correct?

A. That is right.

Q. Do you still affirm that to be the fact?

A. That's a fact.

Q. All right. Now—and you were in the center of the channel?

A. I was in the center of the channel, on those ranges.

Q. You were in complete command of your ship, and the ship handled beautifully, and a good quartermaster at the wheel?

A. That's right.

Q. Yes, sir. And how long after that was it when you gave the full astern order, to give this ship time, as she sheered, to get out of difficulties?

A. Repeat that, please.

Q. I say, how long after this, when you were concerned about her and thought she was going to sheer, as you said she did, was it when you decided to drop your ship to full speed astern? How long after that before you dropped to dead slow was it?

A. Let me get this straight in my mind. You want to know when I realized that the ship was in trouble?

Q. You have already testified to that. I said how long after that time was it when you decided that—when you actually put your ship full astern, how long was it?

A. When I heard him blow the three whistles and let go the anchors.

Q. Yes, sir. All right, sir. So this (indicating) is where he let go the anchor, and this is where your ship was, you said, when he blew the three whistles?

A. When I blew ours back at him, that's right.

Q. Yes, sir. So your ship traveled, then, this distance up to here (indicating), which, of course, on the scale is about two or three ship-lengths, each of these being a hundred feet, and you have, between these points here, you have 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and if you count one of those (indicating) it is 1400 feet your ship traveled before you took any measure at all?

A. At all?

Q. Now wait a minute.

A. All right.

Q. Any measures on your ship at all, of changing your —of going full astern, before you did anything at all, because your course didn't change, you said.

A. I changed course up there (indicating), about two or three degrees to starboard."

Captain Lary further testified on cross examination as follows (R. 3592-3595):

"Q. Yes, sir. So for the time it took your ship to travel about 1400 feet, which is about three ships' lengths, during all of that time, you knew that ship was too close over to the bank, according to this diagram, or your testimony, all of this distance, and you did nothing about reducing your speed any further by backing your ship, did you?

A. No, sir, I didn't.

Q. Yes, sir. Now, if you had decided at this time to give that ship more room in case she sheered across the channel, like you say she did, which you anticipated way back here, if at that time you had gone full astern, would not that have given her more time to break her sheer?

A. I would like for you to rephrase that. If you don't —well, I can answer it. But you are saying—

Q. First, answer my question, sir.

The Court: Had you gone astern earlier than you did, you would have given her more room in case she sheered?

A. Yes, sir. If I would have known, yes, sir, I could have done that.

Q. (By Mr. Eikel) You could have done that?

A. Yes, sir.

Q. And during all this time, when you say you were giving your ship two to three degrees starboard rudder, or right rudder,—

A. Yes.

Q. —you could have stayed in the channel, right on this side of the channel, without steering your helm at all, and you could have gone either way, port or starboard, at any time during that time, couldn't you?

A. That is what I was watching.

Q. Yes, sir.

A. To see what I was going to have to do.

Q. Yes, sir. But it was only here, at this place you marked, about this position, when you heard his anchors dropping and heard what you consider a three-blast signal,—

A. Yes.

Q. —that you put your engines on full astern?

A. That's correct. That's when I knew there was risk of collision.

Q. All right. And that's the first time when you considered that there was a fear of collision?

A. That's right. I knew, he was in trouble, but not a risk of collision.

Q. And you testified that at that time, from that point on, there was no way you could have avoided the collision? That's what you said a moment ago, wasn't it?

A. From what point?

Q. From this point here, where you heard the anchors dropped and went full astern, in your opinion, you could not have avoided the collision at that point, could you?

A. I could not have avoided the collision.

Q. Yes, sir.

A. No, I didn't figure we would. I figured there was risk of collision, but I didn't figure it couldn't be avoided.

Q. All right, now, just tell me what you—at this point, when you went full astern, and at this point where you heard his anchors dropping, and heard him blow the three-blast signal, could you have done something to avoid the collision, or not, now? I just put it to you blankly. What could you have done to avoid the collision then?

A. I tried to do just what I did, run her aground.

Q. Well, now, you didn't answer my question. Could you have avoided the collision at this point, when your ship was there?

A. I don't believe I could have, no.

Q. All right, sir. But you could have avoided the collision anywhere up in here (indicating), by taking different measures, couldn't you?

A. It's possible.

Q. Yes, sir. What could you have done between these two points to have avoided the collision?

A. I could have put her full astern.

Q. Well, if you had put your ship full astern earlier, you wouldn't have had to try to run her into the bank then, would you?

A. I can't say that. I don't know.

Q. All right, sir. But you said that's one thing you could have done to avoid the collision, put your ship full astern, isn't that right?

A. It is one thing I could have done, yes, sir.

Q. Yes, sir.

A. If I would have deemed it necessary.

Q. That's right. Then there is another thing you could have done, if you had put your ship astern here: You would have slowed her so that you certainly could have checked her further with dropping an anchor, couldn't you?

A. It might have helped some, but by running her aground I don't think it would have made any difference."

Captain Lary testified on pages 3596-3597 that, though he knew the UNION RELIANCE "was in trouble" when near the westerly bank, he "figured that she would break her sheer." See following testimony appearing on pages 3596-3597 of the Record:

"Q. All right, sir. So any time in here (indicating), you could have done at least two or three things, any one of which would have been a material influence in avoiding the collision; you could have backed the engines, you could have slowed the ship so you could drop an anchor, or you could have changed course?

A. I was slowing the ship.

Q. All right, you were slowing the ship, but you didn't put her full astern, except here (indicating), is that right?

A. That's right.

Q. All right, sir. And you expected this ship to do exactly what she later did, sheer to her port off of the west or the east bank, when you were back in here and she was up here, a distance on the map there of almost a mile apart, is that correct?

A. I figured she would sheer?

Q. Yes, sir; you said there was danger of it, you remarked to the mate.

A. Yes, sir; I figured that she was in trouble.

Q. Yes, sir.

A. But I figured that she would break her sheer.

Q. But to break her sheer, she would have had to come across the center line over here, and take some measures to bring her back over here, so you knew she was coming over here, didn't you?

A. I knew she was coming back towards the center of the channel, yes.

Q. Yes.

A. I didn't know the draft of the ship.

Q. Yes, but you knew she was a good-sized vessel, didn't you?

A. Well, we had a lot of sailing that night; I didn't know what ship it was till after the collision.

Q. I didn't ask you that, I mean you knew from her lights she was a good-sized vessel?

A. She was a good-sized ship."

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NO. 933

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD.,
*Petitioner,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Respondents*

## PETITION FOR WRIT OF CERTIORARI
## To The United States Court of Appeals For the Fifth Circuit

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1. The decisions below that the manufacturer-shipper and the carrier of a lethally dangerous bulk cargo can lawfully transport it with less than the industry's highest recognized degree of care, so disregard general regulations of the Coast Guard, need not heed warnings that the Coast Guard particular classification of the chemical is improper, and are not liable for all the consequences resulting from the manner of carriage, is an important question of federal law which has not been but should be decided by this Court.

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2. The decisions below holding a vessel owner liable *in personam* under the Wreck-Removal statute, 33 U.S.C. § 415, for not only the expenses of removal from the channel of its cargo-laden vessel but also precautionary expenses incurred *not* to clear a channel, decide an important question of federal law which has not been but should be decided by this Court.

   The decisions below are contrary to decisions of other Courts of Appeal, and the decisions requiring a petitioner to free his vessel from a lien before he can seek limitation of liability are contrary to the Limitation of Liability Statute and the Rules of this Court on limitation. ..... 40

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3. In denying petitioner exoneration to its cargo from fire losses the Court of Appeals has decided an important question of federal law contrary to applicable decisions of this Court and of other Courts of Appeal.

   The trial Court found the collision which preceded the fire caused by negligence of members of the crew of petitioner's vessel. Applicable decisions heretofore have established that "neglect" of a vessel owner which forfeits his right to exoneration under the Fire Statute (46 U.S.C. § 182) must be *personal* neglect in causing the fire, not negligence of subordinates such as crew members 46

4. Whether the owner of a vessel which comes into collision is entitled to exoneration under the Fire Statute (46 U.S.C. § 182) from liability to its own cargo *from fire which spread from the other vessel* following the collision is an important question of federal law which has not been but should be decided by this Court.

   Is an owner reasonably obligated to foresee that should his ship collide with another vessel fire would probably spread to his vessel's cargo from the other vessel's cargo, and can the owner be rightfully held to have been personally negligent for not anticipating and in preventing fire damage to his vessel's cargo under such circumstances? . . . . . 50

5. After finding that the collision was caused by negligence of the officers and crew to which under no circumstances the owner could be privy nor of which could it have had knowledge, the Courts below denied limitation of liability to petitioner on the ground that it had not exercised due diligence to make its vessel seaworthy because it had

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manned the vessel with an incompetent crew. The evidence showed that the officers and crew were properly trained and skilled with many years of experience and were fully licensed.

The decision of the Court of Appeals is contrary to applicable decisions of this Court and of other Courts of Appeal on an important question of federal law ..... 52

6. The decision of the Court of Appeals affirming that of the trial Court in wholly absolving the BEREAN from causative fault is contrary to applicable decisions of this Court and of other Courts of Appeal, upon important questions of federal law.

The undisputed physical facts and the admissions of the BEREAN'S pilot as a matter of law established that the BEREAN was causatively at fault not only in failing to keep a proper lookout but also for her excessive speed, her failure to observe the Rules for passing, and her failure to take proper measures to avoid collision immediately upon apprehending the danger of collision. Holding such plainly established violations of the statutes and Rules enacted to prevent collisions at sea and to minimize their consequences not causative or not faults, is contrary to established law and violates recognized standards of navigational care ..... 55

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NO._____

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD.,
*Petitioner,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Respondents*

## PETITION FOR WRIT OF CERTIORARI
**To The United States Court of Appeals**
**For the Fifth Circuit**

*To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:*

Petitioner China Union Lines, Ltd., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on July 27, 1966.

## OPINIONS BELOW

The opinion of the Court of Appeals (Kilkenny, District Judge of the District Court of Oregon, sitting by designation) is reported at 364 F.2d 769 and 1966 A.M.C. 1653. It is printed as Appendix A to this petition.

The opinion of the District Court (Connally, D.J.) is reported at 222 F.Supp. 874 and 1965 A.M.C. 901. It is printed as Appendix D. The District Court's opinion on payment of salvage claims out of the proceeds from the sale of the vessel is not reported; those portions here pertinent (to the government's Wreck-Removal claim) are printed as Appendix E. The complete Memorandum opinion on salvage matters is at R. 1148 et seq.; the order requiring petitioner to pay the government's actual expense claim is at R. 1293.

## JURISDICTION

The original judgment of the Court of Appeals was entered on July 27, 1966. On August 15, 1966, a fifteen-day extension of time for the filing of petitioner's motion for rehearing was granted by the Court of Appeals. The motion for rehearing was filed August 19, 1966, and denied by the Court's order made on October 7, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1.

American Cyanamid Co., manufacturer-shipper of a lethally poisonous, inflammable and explosive chemical,

having knowledge and the means of knowledge that the Coast Guard classification of the particular chemical as an inflammable liquid only was improper, caused the shipment by water in bulk of tons of the chemical. It knew that the chemical would be transported in forward wing-tanks of the carrying vessel against the skin of the ship. Such carriage did not conform to Coast Guard requirements for stowage of inflammable liquids having poisonous properties. Nor were the industry's well-known higher standards of care for shipment of such dangerous chemicals met by such stowage.

Can such a manufacturer-shipper avoid liability to third persons where as a direct result of the stowage in wing-tanks, contrary to the higher standard of care for carriage imposed both by industry practice, the clear implication of the Coast Guard regulations, and a proper Coast Guard classification of the particular dangerous chemical itself, numerous persons lost their lives and were injured and large property losses occurred?

2.

An ocean carrier transporting dangerous chemicals in bulk, warned by the shipper's description that the chemical was of great toxicity as well as highly inflammable and explosive, stowed tons of the chemical in its vessel's wing-tanks forward. The specific classification of the chemical (acrylonitrile) by the Coast Guard was as an inflammable liquid only. The Coast Guard regulations required cofferdam stowage, i.e., not in wing-tanks, for carriage in bulk of inflammable liquids with dangerous, poisonous properties, and for such chemicals other manufacturers-shippers and carriers used cofferdam stowage.

Had the stowage been in conformity with the higher standard no loss of life nor large property damage from fire would have resulted from collision with another ship.

Can the carrying vessel and its owner avoid liability for the losses resulting from the lesser standard of care used in the actual stowage of the lethal cargo on the ground that their obligations were fully met by compliance with stowage permitted by the Coast Guard cargo classification for this particular chemical?

3.

Under the statute authorizing summary clearance of obstructions from navigable channels, with removal expenses a "charge against such craft and cargo", 33 U.S.C. § 415, the U. S. Engineers clear a channel by removing a cargo-laden vessel to an anchorage outside of the navigable channels. To prevent the possibility of the vessel drifting and again blocking a navigable channel, additional precautionary expenses of a stand-by tug are incurred.

The vessel owner seeking limitation of liability surrenders the vessel, with cargo still aboard. The trial Court requires the owner to pay the United States the actual expenses of removing the vessel from the channel as a condition to allowing him to seek limitation, and after the trial on the merits finds the owner solely at fault for the collision which led to the channel blockage and decrees *in personam* liability against the owner for the additional precautionary expenses.

Can an owner thus be made to bear *in personam* all such expenses, the precautionary as well as the actual removal expenses, on account of the cargo as well as the vessel, where the statute grants only an *in rem* lien against both vessel and cargo for actual removal expenses?

The trial Court found that the primary and direct cause of collision of two ships was failure of a steering engine pump motor on one of the vessels, caused by negligence of the ship's electrician, who used a wooden block in a switch to circumvent a safety device and caused a fuse to blow. Without referring to the statute exonerating a vessel owner from liability to its own cargo from fire where such *fire was not caused* by the "design or neglect" of the owner (the so-called Fire Statute, 46 U.S.C. § 182), exoneration to its cargo and limitation were denied, upon the ground that since the owner had knowledge that the main engines were in need of repair it was negligent in not having had made a most careful examination of the steering system, which would "no doubt" have led to a discovery of the use by the electrician of a wooden block.

Can a vessel owner be denied exoneration from liability to its vessel's cargo destroyed by fire where the Court specifically finds the cause of the collision which was followed by the fire to be the negligence of a crew member, and *imputes* to the owner "neglect" in causing the fire its failure to discover the negligent practice of the crew with respect to the steering system because of the owner's not making an inspection of a steering system of standard design that had operated properly during many months of use?

5.

Following a collision between two ships, fire spreads to an owner's vessel from an inflammable cargo which was aboard the other ship. The fire destroys much cargo as well as causes the loss of the owner's vessel.

Can an owner be held guilty of the statutory "neglect" in causing the fire which prevents exoneration from liability to his vessel's cargo, for fire which spreads to his vessel from an inflammable cargo carried aboard the other vessel, contrary to the rule that a person is negligent only where he can reasonably foresee the harmful consequences of his conduct, i.e., can a vessel owner be held for personal neglect in causing the fire in not foreseeing that a ship with which his vessel might collide might be carrying an inflammable cargo which might cause his own vessel's cargo to be destroyed by fire?

6.

The primary and direct cause of a collision between two ships is found to be the failure of the steering system of one caused by negligence of the ship's electrician. A contributing cause was found to be using only two instead of the ship's four engines to go astern after the steering failed. The owner was denied limitation of liability for failure to instruct the master and chief engineer on the use of four engines, and in thus manning the ship with an incompetent crew.

Can an owner be charged with privity and knowledge of the crew's negligence found to have caused a collision, on the ground that he should have instructed fully licensed officers of many years' experience about matters of ship operation which they testified they were well aware of and which licensed officers were bound to know?

7.

When it is a mile away from the outbound vessel and proceeding at its full speed of 15 knots without a lookout in a narrow channel at night, the inbound vessel's navigator

(pilot) sees the other vessel in a predicament where he knows a collision will probably occur unless the other vessel can recover control; he reduces speed somewhat by dropping his engines to half ahead and then slow. He blows a one-blast whistle signal for a port-to-port passing and without an answer makes a slight turn to the starboard side of the channel to shape up for the passing he has requested. He hears the other vessel's anchor chains running out. Then and only then he reverses his engines and tries to avoid collision by running his vessel aground on his right bank. The bell books show his vessel ran for one minute after apprehending danger (the time between the half ahead and full astern bells), and the positions of the outbound vessel's anchors and length of chain out to each anchor show the outbound vessel was fully on the inbound vessel's right side for not less than a minute before the collision.

Can the admissions of the pilot, the inbound vessel's bell book entries, and the undisputed physical facts establishing the inbound vessel's causative statutory faults be lawfully disregarded and that vessel completely exonerated from blame?

Can findings and conclusions material to a decision but contrary to the undisputed physical facts lawfully stand?

## STATUTES AND REGULATIONS INVOLVED

**(Printed as Appendix F)**

1.

*Statutes Here Pertinent to Dangerous Cargoes*

46 U.S.C. § 170—"Regulation of carriage of explosives or other dangerous articles on vessels—Vessel defined"

46 U.S.C. § 391(a)—"Vessels having on board inflammable or combustible liquid cargo in bulk"

*Coast Guard Regulations Thus Pertinent*

46 C.F.R. § 39.01-1—"Scope of regulations—TB/ALL."
46 C.F.R. § 39.05-1—"Design, construction, and arrangement—TB/ALL."
46 C.F.R. § 146.01-1—"Purpose of regulations."
46 C.F.R. § 146.02-5—"Compliance."
46 C.F.R. § 146.03-8—"Dangerous articles defined."
46 C.F.R. § 146.04-5—"List of explosives and other dangerous articles and combustible liquids"
46 C.F.R. § 146.25-5—"Extremely dangerous poisons, Class A, poison gas label."
46 C.F.R. § 146.25-10—"Less dangerous poisons, Class B, liquids and solids, poison label."

2.

*Recovery of Channel-Clearing Expenses*

33 U.S.C. § 415—"Summary removal of water craft obstructing navigation"

3.

*Exoneration to Cargo from Loss by Fire*

46 U.S.C. § 182—"Loss by fire"
46 U.S.C. § 1308—"Rights and liabilities under other provisions of Title 46"

4.

*Limitation of Liability*

46 U.S.C. § 183(a)—"Amount of liability; loss of life or bodily injury; privity imputed to owner; 'seagoing vessel'"

Rule 51, Supreme Court Admiralty Rules (presently Civil Supplemental Rule F)

5.

*Navigational Statutes*

(and Pilot Rules)

33 U.S.C. § 203—"Steam vessels approaching, meeting, or passing one another; . . . (Art. 18)"

33 U.S.C. § 210—"Steam vessel in narrow channel (Art. 25)"

33 U.S.C. § 212—"Special circumstances requiring departure from rules (Art. 27)"

33 U.S.C. § 221—"Usual additional precautions required generally (Art. 29)"

*Navigation Regulations*

Corps of Engineers

33 C.F.R. § 207.180(a)(3)(ii)—"A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion . . ."

*Foreign Statutes*

6.

Laws of the Republic of China, Civil Code-Book of Obligations, Articles 192, 193, 194; Maritime Law, Article 50.

## STATEMENT OF THE CASE

### Summary

Shortly before midnight of November 7, 1961, petitioner's motor vessel the UNION RELIANCE collided with the Norwegian motor vessel the BEREAN in the Houston Ship Channel, in the open waters of Galveston Bay.

The point of first contact is established by undisputed physical facts with exactitude as having been somewhat east of the channel center and 300 to 500 feet upstream toward Houston from an imaginary line drawn at right angles to Buoy 73.

The UNION RELIANCE was partially loaded with a cargo of general merchandise. (She had come from the Far East fully loaded and discharged some cargo at Los Angeles and Houston.)

The BEREAN was a tank vessel newly-built for the bulk chemical trade, and it was carrying in her farthermost forward tanks, her four No. 1 tanks, bulk Acrylonitrile cargo. This cargo had been manufactured (and shipped pursuant to a long-term contract with the BEREAN'S owners) by the American Cyanamid Co. The port side of the No. 1 port wing-tank of the BEREAN was the skin of the ship, and it was pierced by the collision. The 226 tons of this lethal chemical in this tank escaped and caught fire.

Hull damage from the impact alone to the UNION RELIANCE was almost entirely confined to its stem, and to the BEREAN to its port side from its forecastle bulwarks aft to the after part of No. 1 port wing-tank. Only this tank of the vessel's cargo spaces was ruptured by the collision.

The fire which followed on the impact did little additional damage to the BEREAN, but flames enveloped the UNION RELIANCE and consumed the entire forward parts of that vessel, gutting the bridge and destroying completely the mixed dry cargo carried forward of amidships. The pilot and eleven members of the crew of the UNION RELIANCE lost their lives, and the captain and other UNION RELIANCE crew members suffered burns.

Had the acrylonitrile not been carried in the BEREAN'S No. 1 port wing-tank there would have been no loss of life or personal injuries, nor loss of cargo, nor loss of the UNION RELIANCE. Inboard tanks were available.

After the collision the UNION RELIANCE lay securely anchored by both anchors and locked to the BEREAN. The BEREAN was separated from the UNION RELIANCE with tugs and early on November 8 returned to Galveston. On November 10 the U. S. Engineers to clear the channel caused the UNION RELIANCE'S anchor chains to be cut and the vessel to be towed to an anchorage area in Galveston Bay. Petitioner commenced salvage operations, but after it had extinguished the fires the marshal seized the vessel under a libel filed by the United States seeking an immediate sale to reimburse the government not only for channel-clearing expenses but also for precautionary charges incurred after removal of the vessel from the channel.

The petitioner thereupon sought limitation, its interest in the vessel was transferred to a trustee, the cargo salved, the hulk sold, and the matter moved into litigation.

The subject matter of the cases here being a collision of ships on navigable waters, the District Court had juris-

diction under the United States Constitution, Article 3, Section 2, Clause 1; 28 U.S.C. § 1333; the statute empowering removal of channel obstructions, 33 U.S.C. § 415; the so-called Fire Statute, 46 U.S.C. § 182; and the Limitation of Liability statutes, 46 U.S.C. §§ 183, 185, 188.

## The BEREAN'S Lethal Cargo

The BEREAN'S owners negotiated a contract with claimant American Cyanamid Company to transport large quantities of the chemical acrylonitrile to the company's plant in Holland and devoted to contract performance the newly-built BEREAN. When the contract was being negotiated a comprehensive Cyanamid Company pamphlet describing the properties of acrylonitrile and indicating safe handling procedures was handed the BEAREAN representatives, but they indicated, the American Cyanamid Company representative testified, that they "knew as much about" acrylonitrile as did American Cyanamid Company. R. 3367.

The cargo on this voyage was loaded in the forward tanks of the BEREAN, without any cofferdam space between the ship's skin and the acrylonitrile in the No. 1 port wing-tank. American Cyanamid's employee knew of this location (he inspected the tank for suitability before loading) and no request was made for a different place on the ship for carriage although inboard tank spaces were available. R. 4073, 4077; BEREAN Exhibit 50.

When certain tests were made of the properties of acrylonitrile, American Cyanamid was cautioned by at least one toxicologist that had such tests been made, the "rat tests" referred to in 46 C.F.R. § 146.25-10, the chemical would be subject to Coast Guard rating as a B poison-

inflammable chemical instead of the actual rating as an Inflammable Liquid only. R. 2056-57. Coast Guard Regulations require bulk inflammable chemicals with the B rating to be transported in interior tanks or cofferdam-protected spaces. 46 C.F.R. §§ 39.01-1, 39.05-1.

At the time of trial petitioner called as witness this toxicologist, one who had tested this chemical for American Cyanamid, a Dr. Brieger. He testified the chemical should have been described in the American Cyanamid descriptive literature as having *the same* lethal characteristics as cyanide, not "similar" characteristics, and that it was certainly as lethally dangerous as the 5 per cent strength hydrocyanic acid rated B by the Coast Guard, 46 C.F.R. § 146.25-5. R. 2054.

Another witness, a loading chemist, testified the practice followed by some manufacturer-shippers of like chemicals in the Texas area was to require when the chemicals were shipped by water that they be stowed in cargo spaces separated from the skin of the vessel by cofferdam spaces. R. 3318. A naval architect testified it was commonly-employed practice in the industry to build new vessels for carriage of such dangerous chemicals in spaces set off by cofferdams. R. 3286-3289.

When petitioner rested American Cyanamid's motion to dismiss as to it was granted and it introduced no evidence.

## The Claim of the United States

To re-open the Houston Ship Channel to navigation, the U. S. Engineers engaged contractors to move the UNION RELIANCE. The anchor chains of the vessel, which was still burning, were cut and the vessel towed to and anchored out of the fairway in Galveston Bay. After petitioner (so invited to act by the Engineers) had ex-

tinguished the fire and removed its dead from the vessel, and was preparing to salvage the valuable cargo, the United States Marshal seized the vessel pursuant to the government's libel, which prayed for immediate sale to satisfy the government's claim not only for the expenses incurred to clear the channel up to the time the vessel was re-anchored but also for expenses incurred over petitioner's protest to keep a stand-by tug cruising nearby so as to be available should the vessel drag anchor and threaten again to block navigable channels.

With its vessel and the cargo thus in the marshal's hands, petitioner sought limitation of liability by transfer to the court-appointed trustee of its interest in the vessel plus any freights pending.

No payment to satisfy the government's channel-clearing expenses was made before such transfer.

Before trial on the merits, but after there was in the registry $109,000 from sale of the hulk of the vessel by the trustee, the trial Court required petitioner to pay the government the channel-clearing expenses (reserving for later determination the government's claim for the precautionary expenses), holding that a limitation petitioner had no right to surrender its interest in a vessel until it had satisfied the government's statutory lien (given by 33 U.S.C. § 415). R. 1151-1155.

## Circumstances of the Collision

### THE UNION RELIANCE

When the UNION RELIANCE sailed from Houston on the evening of the collision outbound to sea, the star-

board steering system was in use. The main electric motor of the starboard steering mechanisms developed a "short" as the vessel proceeded while in the land-locked channel. The ship promptly anchored. It was found that a carbon brush holder had failed. Rather than to delay the short time required to repair the holder, steering was shifted to the port steering mechanisms and the ship proceeded.

The Houston Ship Channel enters the open waters of Galveston Bay at a place called Morgan's Point. About five miles farther on to seaward, between channel Buoys 75 and 76, the channel makes a 15 degree bend to the east (i.e., to the left or port of the outbound UNION RELIANCE). Below that point the channel is straight for several miles. After or while making this turn, steering control was lost and the vessel sheered to her left or port (i.e., toward the east side of the channel). Full astern was ordered on the engines, one of the two third mates on watch on the bridge was sent below by the captain to tell the engineers of the loss of rudder control, and the other third mate was dispatched to get additional men forward to assist the bow lookout in handling the anchors; the anchors were dropped; and warning signals were blown to the oncoming inbound vessel the BEREAN.

At the full speed the vessel travelled before going astern before the collision, between Morgan's Point and the place of collision, the vessel's average speed was less than 9 knots.

The sole survivor of the four persons left on the bridge after the departure of the mates (two helmsmen, the pilot, the captain) was the captain. The captain jumped overboard right after the collision and suffered burns to both hands and face. The two helmsmen and the pilot died in the fire and/or from the lethal chemical fumes. The three

persons who were on the forecastlehead handling the anchors all perished: The badly-burned bodies of two were found on the forecastlehead behind the anchor windlass, and the body of the third (that of the boatswain, who rushed aft shouting to rouse the crew to fight the fire) being retrieved later from the Bay waters.

The captain of the UNION RELIANCE was taken to a hospital after being picked from the water. By a report to petitioner (transmitted through the third mates) dated November 8 he stated that after his ship's one-blast whistle for a port-to-port passing was answered by one blast, the pilot ordered the ship to starboard in the channel to make the passing, and "after we found the ship's position was too close to the starboard side of canal, we swung her port bow a little. At that moment the rudder was suddenly out of control again." R. 3461.

Two days later the Houston newspapers carried an interview with the captain had at the hospital in which he was reported to have said his vessel came into collision because his ship's steering mechanism failed.

Considerably later when his discovery deposition was taken after he had been released from the hospital, and upon trial, he claimed that his ship was making the turn between Beacons 75 and 76 when after an order to port was given to make the turn, the helmsman said the rudder was not coming. He claimed his ship was near the center of the channel, denied his ship had gotten close to her right bank, and vociferously claimed the steering controls on the bridge were inoperative after the port rudder order, until just before the collision when the helmsman reported rudder control again.

## THE BEREAN

After picking up her pilot at the sea buoy, the BEREAN proceeded to Houston at speeds which averaged from the sea buoy to the place of collision slightly more than 15 knots. She had been going ahead at full speed for some time before she slowed to half ahead when her pilot saw the UNION RELIANCE too close to its right bank. She had no lookout anywhere on the vessel, and when the UNION RELIANCE was observed too close to its west channel side her captain was below and there were only the helmsman, the third mate, and the pilot on her bridge. The captain came up on the bridge when he heard the engines put astern. (He did not testify on trial, having died aboard the BEREAN from acrylonitrile poisoning shortly after his ship had been repaired and returned to service, within the year following the collision.)

The UNION RELIANCE was first sighted by the pilot six to seven miles away. When the vessels were a mile apart, the BEREAN pilot testified, he saw that the UNION RELIANCE on making the turn was too close to her right bank, west of the channel range lights, so that he anticipated from his own experience that she would sheer away from her right bank. The BEREAN was then in the center of the channel. To enable the UNION RELIANCE to recover from the anticipated sheer he dropped his full ahead speed at 2210 to half ahead and slow. He blew a one-whistle blast for a port-to-port passing and without receiving any reply directed his ship a little to her right to shape up for the passing.

When the vessels were about six-tenths of a mile apart, he heard the anchor chains of the UNION RELIANCE running out, her danger signal, and knew a collision was

imminent. He went full astern on his engines (at 2211 the bell books show) and attempted to stop the ship by running her onto her right bank. As his vessel lay stopped by such grounding the UNION RELIANCE ran across channel and struck her.

He illustrated his testimony by a diagram, Berean Exhibit 63, and this diagram (in reduced but exact scale) is reproduced in the composite diagram Appendix H, with pertinent parts of his testimony printed Appendix G.

His apprehension that the UNION RELIANCE was in a precarious position when his own vessel's engines speed was reduced from full to half ahead was corroborated by the third mate, *and so found by the trial Court.*

He emphatically affirmed that the cause of the across-channel movement of the UNION RELIANCE was from a sheer caused by her having gotten too close to her starboard bank on making the turn at Buoys 76-75.

## The Physical Facts Establishing the Position of the UNION RELIANCE Before the Collision and the Place of Collision

On November 9 the ship was still afire forward before it was moved by contractors employed by the U. S. Engineers to Galveston Bay. The anchor brakes were visually examined from a hoist, and they could both be seen to be screwed down and holding.

The intertwined, badly burned bodies of two men were observed some feet aft of the anchor windlass.

A diver located the anchors, and a skilled mariner surveyor and the Engineers' moving contractor foreman testified without contradiction that the port anchor was found

east of the center of the channel *450 feet upstream from a point opposite channel Buoy 73*, with 180 feet of chain out to the anchor from the ship's windlass, and the starboard anchor was 650 feet farther upstream from the port anchor, in about 25 feet of water on the eastern slope of the 36-foot deep channel. There were 800 feet of chain out from the starboard anchor, and this chain led under the ship.

The chains were cut, the anchors picked up and together with the chain stowed on the derrick barge, and the vessel was towed to Galveston on one chain and re-anchored on the other. This was on November 9.

On November 11, a skilled mariner employed by the BEREAN as a surveyor accompanied by a diver went to the scene of collision to attempt to locate a bank indentation to corroborate the statements from the BEREAN that it had gone aground. A passing shrimp boat hooked a large piece of metal. Its location was carefully marked by the diver and surveyor, a fresh bank indentation the width of the BEREAN found opposite it, and on salvage of the metal it was found to have been a part of the bulwarks of the BEREAN.

This steel was salvaged on November 16, and pictures taken and soundings and measurements made and a sketch made. R. 4430-4432; the photographs appear as BEREAN Exhibits 28-B, 1, 2, 3 and 4 and Petitioner's Exhibits 51-A and B. The sketches are BEREAN Exhibits 28A and 28A-1. The steel was toward the eastern edge of the channel about 50 feet from the edge depth of 19 feet, R. 4434, and out 175 feet from the visible shoreline (of an island made when the channel was dredged). R. 4443. From imaginary lines drawn perpendicularly across channel, the *steel was upstream 725 feet from Buoy 73* and downstream 200 feet from old dredge spoil line saddles on the island. These dis-

tances were estimated with care and were accurate within 50 feet, R. 4456-4458.

When shown photographs, marked Petitioner's Exhibits 52, 53 and 54 the witness identified the saddles on the shore (shown also on Berean Exhibit 28B-9, and Petitioner's Exhibit 51-B) and stated that if the UNION RELIANCE had been parallel to the center line at the time the photographs were made her stern would have been just about opposite the saddles. He marked on the Exhibit 52 an X as about where the steel was found and stated it would probably be about 150 feet from the vessel's bow, not 300 feet. R. 4471, 4472.

The steel was not marked by either fire or explosion R. 4465.

The BEREAN's witnesses testified to seeing the anchor chains out before the impact.

The physical facts accordingly establish: That certainly the bow of the 496-foot long UNION RELIANCE was completely across the channel before the collision. At a mean speed of 8 knots the UNION RELIANCE's bows were on the east side of the channel for one minute before impact: 800 feet of chain was out on the starboard anchor, which equals the 650 feet between the anchors and the approximately 180 feet of chain out on the port anchor. (1 knot equals 100 feet per minute. The vessel's full speed was found to be about 9 knots.) The collision therefore occurred no further upstream than where the *port* anchor was found 450 feet from Buoy 73 and actually in all likelihood the additional length of both chains, 150 to 200 feet further downstream or approximately 300 feet upstream from Buoy 73. The BEREAN went aground *after* the impact, since the bank indentation is no less than 150 feet *upstream*

from where the UNION RELIANCE's port anchor was found.

(The BEREAN pilot's version of the collision, as shown by his sketch made in court, BEREAN Exhibit 63, is reproduced along with the undisputed locations of anchors and the metal from the BEREAN's bulwarks in the composite diagram reproduced below as Appendix H. The BEREAN surveyor's diagram showing the location of the metal is reproduced as Appendix I.)

## The Angle of Collision

### THE NAVIGATORS' TESTIMONY

The captain of the UNION RELIANCE testified that his vessel was anchored when the BEREAN was seen to come directly at his vessel and then swing to her starboard just before impact. R. 1546.

The captain of the BEREAN testified before the Coast Guard that after he ran up to the bridge when he heard his vessel's engines put astern, he saw the high top light of the UNION RELIANCE to his right, that is, that vessel was heading to the BEREAN's port, R. 3473-3475, and at impact the UNION RELIANCE hit in the after part of the forecastlehead and slid down the side of the ship. He then testified the angle of collision was 50 degrees relative. R. 3475.

The BEREAN pilot stated that the UNION RELIANCE turned to her port and ran into the BEREAN after she was stopped aground at an angle of 40 to 50 degrees. R. 3558. The illustrative drawings he made at the time of trial, BEREAN Exhibit 63, as Appendix H, show the UNION RELIANCE travelling down the west side of the channel until she made an abrupt turn into collision.

### POST-COLLISION VESSEL PHOTOGRAPHS

The photographs of the BEREAN show the vessels met almost head on, the metal of the port side forward showing damage starting at the bow overhang of the forecastle and running directly back on the port side and to the afterpart of No. 1 port wing-tank. Please see particularly Exhibit P-2N, and Exhibits P-2A, P-2L, P-2P, P-2M and P-2I. The photographs of the UNION RELIANCE's bow show damage on the stem with metal twisted around to the port side of the stem, indicating a composite force to her port. Exhibits P-3A, P-3B.

## THE PROPULSION AND STEERING MECHANISMS OF THE UNION RELIANCE

### CONDITION OF BOTH MECHANISMS PRIOR TO THE NIGHT OF COLLISION

The UNION RELIANCE was an American-built C-2 type vessel 496 feet long.

She had standard design hydraulically operated dual steering systems, each of which was used separately to control the single rudder. After the vessel's purchase and until the night of the collision these systems had been alternately used to equalize wear, with no breakdown nor the least mechanical nor electrical difficulty. R. 2316, 2324-2325.

The vessel was bought in Greece in April, 1961, without examination of her engines but on the basis of a Lloyd's Certificte that they were operable and in class. After purchase when taken over by petitioner the main engines were found to be badly in need of repairs, and the vessel was sailed to New Orleans where as extensive repairs as could be made with all replacement parts then available were made. After these repairs the original control system was

restored and the engines were made seaworthy and so classed but of course operated at less efficiency than when new. Additional engine spare parts were obtained and put upon the vessel on her return from the Far East but had not been installed before the collision.

No overhaul of or repairs were made to the steering mechanisms, though they were routinely inspected periodically.

The main engines were diesel in type and four in number. They were coupled to the propeller shaft electrically. In cruising all four were usually coupled to the shaft; in harbor and channel maneuvering only two were normally used turning forward with two turning aft, and almost instantly the propeller's rotation could be changed from forward to aft propulsion (or vice-versa) by disengaging one set and then electrically coupling on to the shaft the two other already-running motors. The additional power of the other two engines could be added within a minute by stopping their turning, reversing it, and coupling their power along with that of the other two to the shaft.

All the engineers and the captain testified they were familiar with these engine operations and the times required so to manipulate them. R. 1620, 2213-2214. (The captain and chief engineer testified the owners had not expressly so taught them about the manipulation, but each had had many years of experience in different kinds of ships and had long held full licenses.)

### OPERATION OF THE MAIN ENGINES ON THE NIGHT OF THE COLLISION

The engine room bell book (salvaged from the vessel) showed all four main engines in operation the night of

the collision. Immediately before the last full astern order, which was given before the collision, two of the four engines were already running astern, and almost instantaneously the forward-turning engines were uncoupled and the astern-turning engines were coupled to the propeller shaft and the propeller reversed to run full astern on two engines.

The testimony was undisputed that to have coupled the other two main engines astern would have caused a loss of up to a minute of astern propeller turning out of the two or three minutes before the collision, and that the additional power would not have materially increased the astern propeller revolutions. R. 2213-2215.

### STEERING MECHANISMS OF THE UNION RELIANCE ON THE NIGHT OF THE COLLISION AND AFTERWARDS

As set forth above, when the starboard main motor "shorted" steering was shifted to the port system, over two hours before the collision. The two electricians and the Chief and 1st Assistant engineers (the assistant electrician was working in the steering engine room continuously between the earlier starboard motor failure and the time of collision), testified the port steering engine was operating normally and in all respects properly from when it had been put into use that night right up to the impact of collision.

#### *Conditions Found on Surveys*

The collision and fire made the vessel's engines and generators inoperable. (Salved cargo was unloaded using shore electricity.)

a.

The first examinations of the steering engines were accordingly made without electrical power. Officers from the

Coast Guard examined them right after the vessel was moved to Galveston Bay, within the week after the collision and before the fires (which did not then extend aft of midships) were extinguished. They found no evidence of any defects (except the partly dismantled starboard main motor on which the holder had not been reinstalled), and particularly no leakage on the deck of any steering engine oil. R. 1757, 1755.

b.

The trial Court, on the basis of newspaper stories that the UNION RELIANCE captain said his steering mechanism failed, R. 8, three days after the collision allowed claimants' surveyor to examine the engines, main and steering: This examination was made after the fires were extinguished, on November 19, 1961. He was not called as a witness, but his written report to claimants does not mention any oil leakage in the steering engine room nor any visible defects except the dismantled brush holder of the starboard main motor. Petitioner's Exhibit 60, R. 4844.

c.

A joint survey under court order after the hulk had been unloaded and was readied for sale was held on January 7, 1962, some two months after the collision. A day or two before the survey about 35 gallons of hydraulic oil was cleaned off the deck steering engine room preparatory to the survey. At the time of survey to operate the steering system about 35 gallons of hydraulic oil had to be added to the system. The only explanation offered for the presence of the oil on the deck was that it had leaked out of the engines through a loose sight glass during the two months the vessel had been listing to starboard while the cargo was unloaded.

Electric power was led from ashore by personnel from the dock yard where the vessel then lay and the steering system switches and motors were operated by dock personnel (*not* employed by petitioner but called by it as witnesses). These witnesses testified that they simply connected the shore power lines, and the port steering engine electric system operated normally. They emphatically denied any fuses were replaced or any wooden blocks were used in the switch boxes during the tests. R. 4892-4894; 4872.

All of the several experts, including Coast Guard personnel, testified that the steering mechanisms had only small amounts of the essential hydraulic oil in them but when the hydraulic oil was replaced the steering mechanisms worked perfectly.

(The bridge mechanisms had been gutted by fire to the point they had melted. To the point of fire destruction of the hydraulic lines, no defects in connections to the bridge were testified to.)

Bencal, a surveyor appointed salvage master by the trial Court and who had acted for a number of parties to the casualty at various times, was called by the Court and testified that small wooden blocks found in the steering engine room had been used to prop switches in a box and had probably caused a fuse to blow, causing the port steering mechanism to have failed. He acknowledged he had seen no fuse replaced at the time of survey, was in no position to have seen one replaced, but had "heard someone say" one was replaced. R. 4551.

The ship's electrician testified there had never been any defect in the electrical system in the engine room, except the failure of the carbon brush holder, and that he at times used the wooden blocks found in the steering engine room

as simple tools to prop open switches so that he could more easily sandpaper the points for better contact. R. 2653-2654.

## DECISION OF THE TRIAL COURT

After all cargo which could be salved had been removed from the vessel, in January, 1962, the hulk was sold for $109,000 by the trustee. A hearing to determine what salvage claims should be paid was held, and instead of ordering payment out of the funds in the Registry the trial Court required petitioner to pay the United States the amount it had expended to clear the channel, reserving decision on the government's claim for precautionary expenses. Appendix E.

While counsel was led to believe the case would be argued after the parties' written contentions were filed, R. 4978, the case was decided by the trial Court without oral argument.

The trial Court found the UNION RELIANCE solely at fault, primarily for violating the passing and narrow channel rules (33 U.S.C. §§ 203 and 210) by failing to keep on her starboard side of this narrow channel. It held this primary fault was caused by her steering engine failing with the rudder at the 5 degrees port position used to make the turn at Five Mile Point (Buoys 75 and 76), and "never straightening her course afterward."

While expressing some uncertainty, the Court found that the electrician circumvented a protective solenoid in the switch for the replenishing pump motor, which kept the steering system filled with hydraulic oil, by use of a wooden block (found probably inserted when the port system was started up when the change was made to that system

earlier that night), which blew a fuse and caused the motor to fail and the steering engine to stop from lack of hydraulic oil. He reduced the electrician's recovery against petitioner for his negligence in failing properly to operate and maintain the steering engine room electrical equipment.

The Court found the owners knew the main engines were in bad condition and that such knowledge made them negligent in not having had a careful examination made of the steering engines which "no doubt" would have caused them to discover the use of the wooden blocks and "possibly other deficiencies".

He found causative faults in navigation of the vessel by its crew, found the master and chief engineer at fault for failure to use the engines properly and uninstructed by the owners in their use, found the crew incompetent, and denied limitation on the grounds that the owners failed to exercise due diligence to make the vessel seaworthy with respect to the crew and their failure to operate the vessel properly, as well as because of the failure to examine carefully the steering engines.

No mention was made of the petitioner's defense of freedom from liability to its own cargo accorded by the Fire Statute (46 U.S.C. § 182).

The Court allowed recovery by all against petitioner, including the United States for all its expenses incurred in connection with the casualty, both its actual and its precautionary expenses.

The BEREAN was freed from causative fault. Her pilot was found to have seen everything a bow lookout would have seen had she had one and hence her having no look-

out could not have been a causative fault; all proper measures were taken to avoid collision after risk of collision became apparent; failure to have an anchor watch ready to drop her anchor was found customary and not negligent for this reach of the channel; that the vessel's speed was not negligent, and that it was proper to try to reduce the vessel's full speed by running the vessel aground, and dropping an anchor could not have helped.

The BEREAN was found not at fault in carrying the acrylonitrile cargo in her forward wing-tangs, having complied with the Coast Guard regulation for carriage of this chemical. American Cyanamid Company was granted recovery also.

## DECISION OF THE COURT OF APPEALS

The Court of Appeals found the trial Court's decision supported by evidence and the authorities, with one judge vigorously dissenting on the ground that exculpation of the manufacturer-shipper of the acrylonitrile cargo failed to apply proper standards of care for transportation of such a lethal cargo.

The Court of Appeals did make slight mention of petitioners' claim for exoneration of liability to its own cargo under the Fire Statute, but held the provisions of COGSA were not met and precluded such "escape".

Neither Court fixed the place of collision with particularity nor made reference to the physical facts in that regard, though the Court of Appeals commented that the starboard anchor could have been dropped at a place other than where it was found.

## REASONS FOR GRANTING THE WRIT

**1. The decisions below that the manufacturer-shipper and the carrier of a lethally dangerous bulk cargo can lawfully transport it with less than the industry's highest recognized degree of care, so disregard general regulations of the Coast Guard, need not heed warnings that the Coast Guard particular classification of the chemical is improper, and are not liable for all the consequences resulting from the manner of carriage, is an important question of federal law which has not been but should be decided by this Court.**

**The decision by the Court of Appeals is contrary to general rules of law and decisions of other Courts of Appeal.**

There was clear testimony without contradiction, (American Cyanamid's motion to dismiss as to it being granted) that acrylonitrile was far more deadly than a 5% solution of hydrocyanic acid, listed by the Coast Guard as a Poison A which could not lawfully be shipped in bulk, and it was lethally poisonous in very small quantities by absorption through the skin, by inhalation and by swallowing; and that it would properly have been classed as a B class poisonous inflammable liquid by the Coast Guard had "rat tests" been made. American Cyanamid was so cautioned by the witness Dr. Brieger, hired by it to test the toxicity of the chemical. The pamphlet below described in substance admits such knowledge.

A loading chemist testified other chemical-producing concerns in the Texas area used cofferdam shipment for such chemicals, and a naval architect testified vessels designed for bulk carriage of dangerous chemicals were made with cofferdam spaces.

Mr. Piaget, the American Cyanamid Co. representative who negotiated the contract with the BEREAN's owners under which on this occasion the chemicals were being transported, testified the BEREAN owner's representatives indicated "they knew as much about acrylonitrile as we did." He gave them a company pamphlet, American Cyanamid Co. Exhibit 7, entitled "Handling - Storage - Analyses of Acrylonitrile." R. 5090, 5100, 5103.

This pamphlet states American Cyanamid Co. pioneered the production of the chemical and has distributed ever increasing quantities. It stated its properties were "similar to" those of hydrocyanide acid. On p. 6 of the pamphlet it shows that acrylonitrile had as a component 5 ppm maximum of hydrocyanic acid. In detail the pamphlet cautions against its inflammability and explosive limits and the extreme care that must be exercised in its handling—gas masks to be used, complete protective clothing to be worn, and any amounts spilled on the skin to be washed away immediately. Detailed instructions on the medical treatment of affected personnel should inhalation, skin contact, swallowing, or eye contact occur are set forth.

An employee of American Cyanamid Co. inspected the BEREAN's tanks before loading of cargo. American Cyanamid Co. therefore knew where the chemicals would be stowed. There were other center-line tanks available. R. 4073, 4077, 4084-4086.

That the crew of the BEREAN particularly was well aware of the great danger inherent in the chemical is established by undisputed facts: (1) A large part of the crew took to the life boats immediately after the collision and did not return to the vessel until well after the vessels had been separated. R. 3503. (2) No attempt was made by the personnel remaining on board to fight the fire (which

on the BEREAN was only on its extreme forward portion) until a long time later after Coast Guard personnel had come from Galveston and had brought it largely under control. R. 2289. (3) The captain testified before the Coast Guard the anchors should not have been dropped because of the "explosive cargo" loaded in the forward wing-tanks. R. 3527.

Petitioner submits that dissenting Judge Brown of the Court of Appeals is clearly right in saying that under these circumstances the decisions below are not in conformity with the settled principles of the care required of persons manufacturing and shipping toxic chemicals. His view is too lenient in not so referring to the carrier also. The settled law is much more strict in such cases than his brief statement indicates it to be.

a.

*The Legal Duties of American Cyanamid Co.*

A shipper warrants the suitability of its cargo for shipment and normal handling where no warning is given: *The Nitro-Glycerine Case, (Parrott v. Wells)*, 15 Wall. (18 U.S.) 524, 21 L.Ed. 206 (1873); *Pierce v. Winsor*, Fed. Case No. 11,151, and Fed. No. 11, 150 (D. and Cir. Cts. Mass. 1861); *The Santa Clara*, 281 F. 725 (2 Cir. 1922); *The Richelieu*, 27 F.2d 960 (D.C. Md. 1928); *Poor on Charter Parties and Ocean Bills of Lading*, (4th Ed., 1954), pp. 187 and 188; *Scrutton on Charter Parties* (15th Ed., 1948), pp. 115 and 116.

While the manufacturer here had full knowledge of the lethally dangerous character of its product—one need go no further than to point to the description and procedures

for handling set forth in large type in its own pamphlet *Acrylonitrile—*, and had been warned by its toxicologist of its dangers, nevertheless it is the law that a manufacturer is required to make whatever tests are necessary to acquaint itself with knowledge of its product. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, *Dawson v. McWilliams*, 146 F.2d 38 (5 Cir. 1948), *Reynolds Metal Co. v. Yturbide*, 258 F.2d 321 (9 Cir. 1958), *Chapman Chemical Co. v. Taylor*, 222 S.W.2d (Ark. Sup. Ct. 1949).

Where the shipper as here was well aware of the dangers incident to routine stowage, it logically follows from these cases it is liable for the consequences of acquiescing in routine, dangerous stowage—stowage of tons, not simply gallons in drums, of this dangerous chemical.

Of what value is knowledge not used, to the detriment of the public?

Can it be denied, in view of these cases, that dissenting Judge Brown is clearly right in stating it was the duty of American Cyanamid and not of the Coast Guard to ascertain the lethal properties of the chemical, and to require compliance by its employed carrier with the stricter Coast Guard regulations referred to below, rather than to hide behind a specific classification it must have known to be erroneous?

Finally, the decision below is directly contrary to the recent decision by the Court of Appeals for the Ninth Circuit in *Simpson Timber Co. and Grace Line, Inc. v. Parks*, No. 19,673 on that Court's docket (and petitioner here is informed a writ of certiorari will be sought to review the decision) in which the Court holds a manufacturer of an *ordinary* article need "guard against only those risks it actually knows", as put by the dissenting minority, but

in which the entire court *en banc* agrees that a manufacturer of a "product inherently dangerous or harmful" has a much greater duty of care. (The previous decision, reported only at 1966 A.M.C. 1081, was withdrawn and the case reargued *en banc*. The former decision was changed, by the five-to-four majority.)

Here the case is much stronger to hold American Cyanamid Co. liable as a matter of law for its lack of care, for it was not only the manufacturer of an inherently dangerous chemical, it was the shipper.

b.

*The Duties of the BEREAN and Owners*

Here the evidence establishes without dispute (a) that the owners of the BEREAN had carried acrylonitrile in bulk for American Cyanamid Co. even before the voyage in question, and had ample warning of its dangers through the descriptive pamphlet given their representatives; (b) recognized industry practice was to transport lethally poisonous, inflammable chemicals in cofferdam spaces; (c) had such recognized carriage been employed no deaths, fire, or great property damage would have occurred.

A carrier of dangerous cargoes is certainly under the duty of employing no less care than that used by others in the industry. *The T. J. Hooper,* 60 F.2d 737 (2 Cir. 1932); *Petition of Oskar Tiedemann & Co.,* 289 F.2d 237 (3 Cir. 1961).

That the settled rule requiring the utmost care by a manufacturer-shipper of dangerous substances should be applicable to the carrier could hardly be better put than it has been phrased by Mr. Justice Jackson in his dissenting

opinion in *Dalehite, et al v. United States*, 346 U.S. 15, 52, 73 S.Ct. 156, 976 as follows:

> ". . . This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. *Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public,* nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise." (Emphasis added).

c.

*The Coast Guard Regulations*

While acrylonitrile was listed by the Coast Guard Regulations only as an inflammable liquid, 46 C.F.R. § 146.04-5, the regulations clearly require safer carriage of chemicals which are toxic as well as inflammable: Hydrocyanic acid is classed A, 46 C.F.R. § 146.25-5, and dilute solutions of not exceeding 5 per cent strength are classed B (for which carriage in cofferdam spaces is required, 46 C.F.R. § 39.01-1,

§ 39.05-1). The toxicologist Dr. Brieger testified that acrylonitrile was more deadly than such 5 per cent solution of hydrocyanic acid. R. 2055. American Cyanamid well knew its dangers, R. 2051-53, and the Company's own pamphlet compares it to Hydrogen Cyanide, p. 22 of American Cyanamid Co. Exhibit 7, 20 ppm maximum toxicity in air compared to hydrogen cyanide's 10 ppm maximum toxicity in air.

Of greater weight here, perhaps, is the language of the Regulations defining Class B poisons, 46 C.F.R. § 146.25-10, which expressly state that these are

> "(a) Poisonous liquids or solids (including pastes and semi-solids), other than Class A, C, or D poisons, *which are known to man as to afford a hazard to health* during transportation. . ."

Can it even be argued that acrylonitrile was not known to both American Cyanamid Co. and the BEREAN's owners to be "so known to man as to afford a hazard to health" when the American Cyanamid Co. pamphlet clearly and forcefully so describes it?

Nor can it be lawfully held, even if the particular classification of the Coast Guard be looked to, with the properties of acrylonitrile so well known to both the American Cyanamid Co. and the BEREAN, that they were not obligated to handle it with the greater care required: Neither a manufacturer, shipper, nor carrier can hide behind a government regulation when handling a hazardous substance but must use care commensurate with the risk:

In *Lehigh Valley R. Co. v. Allied Machinery Company of America*, 271 Fed. 900 (2 Cir. 1921), the settled rule is thus put:

> "It is evident that such regulations in the nature of things are applicable to the handling of these dangerous agencies in all situations. But there remains the care appropriate to the particular situation in each case which it would be impossible to cover by general regulations. Such an instance is illustrated in T & P Railroad Co. v. Coutourie, 135 Fed. 465, and Marande v. T & P Railroad Co., 184 U.S. 173, 22 S.Ct. 340. . ."

That decision was followed in *Lehigh Valley Railroad Co. v. John Lysaght, Ltd.*, 271 Fed. 906 (2 Cir. 1921). In still another of the cases arising out of the "Black Tom" explosion, *Fidelity & Deposit Company of Maryland v. Lehigh Valley R. Co.*, 275 F. 922 (3 Cir. 1921), the Court of Appeals for the Third Circuit stated the governing principle in cases where hazardous articles are being transported in this language:

> "The trial court, in interpreting these regulations, regarded them as exclusive whenever they applied, refused to limit the duty of the defendant in the exercise of care to the matters therein prescribed, and broadly charged the plaintiff with the duty, as required at common law and by the settled law of the state, of exercising care commensurate with the risks of danger, the degree of care being high when the risk is great. . ."

and affirmed.

Sec. 288c of the Restatement of the Law of Torts, 2nd, phrases the rule,

> "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."

Petitioner respectfully submits that the principle of law here which has been ignored by the Court below in holding the manufacturer-shipper and the carrier could avoid liability by relying upon the specific substance classification of the Coast Guard and were not held to the higher standards of the general Regulations and of the industry is forcefully stated by the Court of Appeals for the Fourth Circuit, in *Glover v. Yonce*, 188 F.2d 870 at 874 (4 Cir. 1951):

> "What we have held is that, in dealing with an agency known to be so dangerous and deadly, a very high degree of care is required; but that is nothing more than a different way of expressing what is axiomatic in the law; that the degree of care to be exercised in every case should be commensurate with the danger - the greater the danger, the greater the care required - that a very high degree of danger calls for a very high degree of care."

The Court of Appeals for the Fifth Circuit in *Slichter v. Port Arthur Towing Co.*, 288 F.2d 801 (5 Cir. 1961), has itself held government regulations do not necessarily measure the scope of a duty, and that admiralty courts should lead in imposing proper standards of care and not be bound by too literal an interpretation of complex statutes. *Walker v. Harris*, 335 F.2d 185 at 196 (5 Cir. 1964), also so holds.

Finally, clearly the decision of the Court of Appeals for the Third Circuit in *Petition of Oskar Tiedemann & Co.*, 289 F.2d 237 (3 Cir. 1961), is correct, namely, that a carrier to avoid liability to third persons must comply with the industry's highest standards of care in water transportation; the decisions below are directly *contra* thereto.

d.

*Liability for All the Consequences of the Unsafe Manner of Carriage*

The trial Court did not pass upon the question, but the Court of Appeals impliedly held that even had it been held liable that at most American Cyanamid Co. (not the BEREAN and her owners) could be held only for the deaths and personal injuries proved to have been caused by *poisoning*. The dissenting opinion apparently concurred in this holding.

Petitioner respectfully submits that the liability here both of the shipper-manufacturer and the shipowner and its vessel is rightfully for all the direct consequences of the unsafe transportation: Had the lethal and inflammable chemicals been carried *not* in the port wing-tank there would have been no deaths, no personal injuries, and no great destruction of property from the fire. (And of course a number of other tanks could have been used as noted above.)

The statute imposing the use of maximum care in the transportation of dangerous substances expressly states the obligation is designed to protect property as well as the persons of the public and is imposed upon all persons engaged in the transportation process. 46 U.S.C. § 170 (7) and (7) (b) and 46 U.S.C. § 391 (a).

This strict obligation is carried forward into the Coast Guard Regulations, 46 C.F.R. § 39.01-1, 146.01-1, and 146.02-5.

The logic behind the utmost care which public policy as reflected in the statutes and regulations imposes upon all engaged in handling dangerous substances, particularly as

here inflammable liquids with lethal poisonous properties is simple: Fires are customarily fought as though the fire-fighter need regard only the fire itself as dangerous. Where an inflammable substance has properties with lethal properties, it cannot be safely fought. (This point is noted briefly in the dissenting opinion below.)

No better illustration of the basis for holding a person liable for all the direct consequences of negligence in handling a lethally poisonous inflammable liquid can be found than here: Persons who normally could be expected to fight the fire lost their lives, and the fire could not be confined to only the forward part of the UNION RELIANCE as it might well have been but for the extreme toxicity of the chemical.

And finally, how reasonably can it be held that the manufacturer-shipper and carrier of the lethal inflammable liquid are not charged with reasonable foresight of the direct consequences of the unlawful carriage of the chemicals, and to the contrary it be held the UNION RELIANCE owners' charged with reasonable foresight that a collision would be followed by these deaths and destruction on the UNION RELIANCE so as to make them liable for the consequences of the unlawful carriage of cargo aboard the BEREAN?

**2. The decisions below holding a vessel owner liable *in personam* under the Wreck-Removal statute, 33 U.S.C. 415, for not only the expenses of removal from the channel of its cargo-laden vessel but also precautionary expenses incurred *not* to clear a channel, decide an important question of federal law which has not been but should be decided by this Court.**

**The decisions below are contrary to decisions of other Courts of Appeal, and the decisions requiring a petitioner to free his vessel from a lien before he can seek limitation of liability are contrary to the Limitation of Liability Statute and the Rules of this Court on limitation.**

The Courts below have erroneously held petitioner liable *in personam* for (1) the government's expenses in re-opening the Houston Ship Channel by removal of the vessel to a safe anchorage out of the channel fairways in Galveston Bay (*not* Harbor) and (2) expenses incurred over petitioner's protest of keeping a stand-by tug to take action should for some reason the vessel again interfere with navigation.

Decisions of this Court have settled the law that the government's claims for channel-clearing expenses can*not* be based on a common-law right in admiralty but can only arise under the Wreck-Removal Act: In *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811, 815 (1888), this Court held that while unquestionably Congress could enact legislation to prevent obstructions to navigable channels,

> ". . . there is no common law of the United States which prohibits obstruction and nuisances in navigable rivers . . ."

and that there was no precedent for allowing any remedy in admiralty.

The Wreck-Removal Act was enacted in 1899.

In 1960 the question of a common-law remedy against obstructions was again before this Court, and in *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884,

at 887 (1960), rehearing den. 363 U.S. 858, 80 S.Ct. 1605, the Willamette Iron Bridge Co. holding was re-affirmed.

The United States has on several occasions sought an interpretation of the Wreck-Removal Act which would enable it to collect its expenses for removal of an obstruction from a navigable channel from the vessel owner (or other wrongdoer) where it was the owner's negligence that caused the obstruction. In each instance (except the recent Cargill decision of the Court of Appeals for the Fifth Circuit, referred to below) the Courts have declined the government's invitation to grant it recovery *in personam* from the negligent person and have held that the *only right accorded to the United States by the Wreck-Removal Act is to recover its clearing expenses from the vessel* (and cargo) *in rem.*

The holding in *Loud v. United States,* 286 Fed. 56, at 59 (6 Cir. 1923), states the rule clearly:

> "It is equally clear that the owner of a vessel is not personally liable for the expense incurred by the government in removing obstructions to navigation under authority of this section (Section 20 of the Rivers and Harbors Act of March, 1899), but, on the contrary, that the claim for such expenses must be asserted directly against the vessel and its cargo."

In *The Manhattan,* 10 F.Supp. 45, 49 (E.D. Pa. 1935), aff'd., 85 F.2d 427 (3 Cir. 1936), it was flatly held that the Secretary of War can clear a channel without waiting for the owner to abandon, under Section 415, and that

> ". . . the government is given either the wreck itself (in case of removal after abandonment) or a lien against it for the amount expended (in case of immediate removal before abandonment)."

Recently these matters were re-examined carefully by the Court of Appeals for the Ninth Circuit, in *United States v. Bethlehem Steel Corporation (The Texmar)*, 319 F.2d 512 (9 Cir. 1963), and that Court of Appeals once again held that a negligent owner could not be held liable *in personam* for wreck-removal expenses, as follows:

> "The decisions which we have cited constitute an impressive body of authority. There is no decision to the contrary . . ."
>
> "We conclude, then, that Congress, in the light of the historical law of shipping, which seems to have included a right of an owner to abandon a wreck with impunity, probably did not intend to create, in the Rivers and Harbors Act, the obligation *in personam* which the Government here asserts. If we are correct in this estimate, this court should not read such an obligation into the statutes."

Directly contrary to these holdings, petitioner respectfully submits, and insupportable, is the very recent decision of the Court of Appeals for the Fifth Circuit, *United States of America v. Cargill, Inc., et al.*, reported yet only at 1966 A.M.C. 1974, in which the District Court's decision, 1964 A.M.C. 1742, which followed the cases referred to above, has been reversed.

(Petitioner has been informed that the attorneys for the appellees, Cargill, Inc., et al., are now actively preparing to petition this Court for a writ of certiorari in that case.)

The trial Court here in this instant case at first acknowledged that the Wreck-Removal Act allowed recovery of only the actual removal expenses and only *in rem*. Appendix E, its preliminary decision on salvage expenses. But

it nullified this holding by compelling petitioner on pain of dismissing the limitation petition to pay such expenses directly to the government, on the curious reasoning that the government's lien could not be delayed or defeated by surrender of the vessel to the trustee in limitation and the government's lien must be removed by the limitation petitioner before such surrender. (At the time of this decision the hulk had been sold and sufficient moneys were available in the Court's registry to satisfy the lien. The claim was certainly for salvage and lawfully could and should have been paid out of those moneys. *Metropolitan Redwood Co. v. Doe*, 223 U.S. 365, 32 S.Ct. 275 (1912); *The Florida*, 212 F. 334 (S.D. N.Y. 1910).)

This holding is clearly contrary to the holding of this Court in the *City of Norwich (Place v. Norwich & New York Transp. Co.)*, 118 U.S. 468, 6 S.Ct. 1150, at 1156 (1886), where the Court held that the interest in the vessel which must be surrendered is that which the owners had in it immediately after the casualty, as follows:

> "If, however, by reason of the loss or sinking of the ship, the voyage is never completed, but is broken up and ended by causes over which the owners have no control, the value of the ship (if it has any value) at the time of such breaking up and ending of the voyage must be taken as the measure of the owners' liability . . ."

This holding that the interest of the owner which he must surrender is whatever that may be immediately after the casualty is emphasized when applied in several different sets of circumstances by the decisions in *The West Hartland*, 295 F. 547 (W.D. Wash. 1923), 1923 A.M.C. 175; *The Doris Eckhoff*, 30 F. 140 (S.D. N.Y. 1887); and in *Pacific Coast Co. v. Reynolds*, 114 F. 877 (9 C.A. 1902); and

*Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co.*, 197 F. 703 (9 C.A. 1912).

The statute, 46 U.S.C. § 183, granting an owner the right to petition for limitation is likewise directly violated by the trial Court's holding: An owner's only liability if he is successful in the proceeding is limited to the amount or value of his interest in his vessel, in part the statutory language reading,

> "(a) The liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel . . ."

Compelling the owner to pay off liens which have attached to the vessel, either before or after the casualty, as a condition to pursuing his right to seek limitation of course *adds to such interest the amount of the lien so removed.*

Further, the Rules of this Court governing the procedure in limitation cases show that an owner cannot be lawfully compelled to remove liens. Rule 51 of the former Admiralty Rules, in effect when this matter was decided, in part provides,

> "The owner . . . of any vessel who shall desire to claim the benefit of limitation of liability . . . may file a petition . . . Such petition shall . . . state facts showing . . . the amount of all demands including all unsatisfied liens or claims of lien . . .
>
> "If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip . . ."

The intent of the old rule to permit surrender *without* removal of liens is of course since July 1, 1966, carried forward by Supplemental Rule F, printed Appendix F.

Petitioner respectfully submits the decisions below holding it personally liable for the government's wreck removal and preventive expenses are legally insupportable and should be here reversed on this important question.

**3. In denying petitioner exoneration to its cargo from fire losses the Court of Appeals has decided an important question of federal law contrary to applicable decisions of this Court and of other Courts of Appeal.**

**The trial Court found the collision which preceded the fire caused by negligence of members of the crew of petitioner's vessel. Applicable decisions heretofore have established that "neglect" of a vessel owner which forfeits his right to exoneration under the Fire Statute (46 U.S.C. § 182) must be *personal* neglect in causing the fire, not negligence of subordinates such as crew members.**

The trial Court's decision did not mention petitioner's defense that under the Fire Statute (46 U.S.C. § 182) it was entitled to complete exoneration from liability to the cargo aboard petitioner's vessel which was destroyed by the fire spreading from the BEREAN onto its vessel on the collision. It did find that petitioner was negligent in not having had made a careful examination which would "no doubt" have led to a discovery of the *negligent practice* of the ship's electrician which it found the primary and direct cause of failure of the vessel's steering engines and thus the collision.

(There was no finding by either Court that the steering engines were at any previous time, before the night of the collision, in any way defective.)

It found the captain and chief engineer negligent in not using all four engines to go astern before the collision, and directly contrary to their testimony that they knew all four could be so used, found they did not have such knowledge and petitioner at fault for not having instructed them in such use.

For further fault of the petitioner it found the telephone system (directly contrary to the positive testimony of each crew member to the contrary) could not be used, on the ground of a glaring *non-sequitur* that since messengers were used from the bridge the telephones must have been out of order. (There could have been no physical evidence after the collision bearing on the condition of the bridge telephone system before the collision. The bridge was completely gutted by fire. R. 4288, 4337.)

Petitioner respectfully urges there is not a single fault finding made by the trial Court against the vessel or crew that can be even fancifully construed to find petitioner was guilty of *personal neglect* in connection with the collision.

(The Court of Appeals hardly dealt more carefully with the matter when it affirmed liability to cargo under COGSA, 46 U.S.C. § 1300 et seq., on the ground that the fire was caused by a failure to make the vessel seaworthy and to properly man the vessel, and thus "caused by the actual fault with privity of the carrier". COGSA expressly states it does not affect the Limitation or Fire Statutes. 46 U.S.C. § 1308.)

Petitioner respectfully urges, that clearly under the facts found, the Fire Statute exempts it from liability to its cargo. There has been no finding that petitioner was guilty of personal neglect in causing the fire; instead the fact findings establish the exact contrary, at most that the collision was caused by the negligence of the crew, for which an owner cannot lawfully be held liable to cargo under the Fire Statute:

The Fire Statute exonerates an owner from cargo loss from fire unless caused by "design or neglect" of the owner.

Certainly the fire was not caused by "design".

Shortly after the enactment of the Fire Statute, in *Walker v. Western Trans. Co.*, 3 Wall. (70 U.S.) 150, 153, 18 L.Ed. 172, 174 (1866), this Court laid down the still unquestioned rule that the neglect of the owner to defeat exoneration must be his *personal* neglect: In that case the Court held:

> "We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liabile for the misconduct of the officers and mariners of the vessel in which he does not participate personally."

This case was expressly followed in *Craig v. Continental Ins. Co.*, 141 U.S. 638, 12 S.Ct. 97 at 99 (1891), and it was held that

> ". . . When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. . ."

That a vessel was unseaworthy and for that reason an owner would be liable for fire damage to cargo is certainly not the law. In *Earle & Stoddart, Inc. v. Ellerman's Wilson Line*, 287 U.S. 420, 427, 53 S.Ct. 200 (1932), where the

vessel was lost from fire caused by the chief engineer's putting new upon old coal before the voyage commenced (a much stronger case than the instant one where the crew's negligence was found to have occurred long after the voyage commenced, just before the collision) this Court emphasized that to be denied exoneration personal neglect of the owner must appear and added,

> ". . . The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty. . ."

Following this case, the Court of Appeals for the Second Circuit held in *Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha*, 133 F.2d 781 (2 Cir. 1943),

> ". . . 'neglect' means personal, and not imputed negligence. . ."

This Court affirmed, 320 U.S. 249, 64 S.Ct. 15 (1943), in language fully applicable here:

> "To sustain their contention would deny effect to the Fire Statute as an immunity and convert it into a limitation of liability to the value of the ship. This is what Congress did in other sections of the same Act and elsewhere which suggests that it used different language here because it had a different purpose to accomplish. Congress has said that the owner shall not 'answer for' this loss in question. Claimant says . . . that he shall answer only with his ship. But the owner would never answer for a loss except with his property . . . . It seems to us that Congress has, with the exception stated in the act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revise them . . .

> ". . . It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance."

To like effect that negligence cannot be imputed to a shipowner under either the Fire Statute or the Limitation of Liability Act are *The 84-H*, 296 F. 427 (2 Cir. 1923), *Hoskyn & Co. v. Silver Line, Ltd.*, 143 F.2d 462 (2 Cir. 1944), *American Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 449 (2 Cir. 1951), and indeed a recent decision of the Court of Appeals for the Fifth Circuit, *Hartford Accident & Indemnity Company v. Gulf Refining Company*, 230 F.2d 346 (5 Cir. 1956).

In *Globe & Rutgers Fire Insurance Co. v. United States*, 105 F.2d 160 (2 Cir. 1939), a case quite similar to the instant one, the vessel's propulsion machinery was found to have been old and defective though the shut-off valve allegedly causing the fire damage was found not improperly designed (just as here there is *no* finding that the steering engines were unseaworthy in any way). Contra to the instant case, exoneration from fire was allowed, even though the negligence of the crew (the chief engineer) was found to have caused the fire.

The Court of Appeals decision here, affirming specific fact findings that the crew's negligence caused the collision and ensuing fire, is directly *contra* to these decisions.

**4. Whether the owner of a vessel which comes into collision is entitled to exoneration under the Fire Statute (46 U.S.C. § 182) from liability to its own cargo *from fire which spread from the other***

***vessel* following the collision is an important question of federal law which has not been but should be decided by this Court.**

**Is an owner reasonably obligated to foresee that should his ship collide with another vessel fire would probably spread to his vessel's cargo from the other vessel's cargo, and can the owner be rightfully held to have been personally negligent for not anticipating and in preventing fire damage to his vessel's cargo under such circumstances?**

It is of course an essential element in "neglect" or "negligence" that before the person be held negligent it be held that consequences of his negligence be reasonably foreseeable.

The generally recognized rule is aptly stated and followed in *Republic of France v. United States*, 290 F.2d 395, 399 (5 Cir. 1961):

> "In Texas, as elsewhere, not only proximate causal connection but also the very existence of a duty the breach of which will constitute actionable negligence depends upon reasonable foreseeability of consequences."

Reference is made to *Prosser on Torts*, 2d ed., pp. 258, 259.

Petitioner believes there are no decisions holding an owner liable for damage to its own vessel's cargo where after a collision fire *spreads from the other colliding vessel.* The only case relating to this important question is *The City of Norwich*, 5 Fed. Cas., No. 2760 (D.C. N.Y., 1869): A steamer was holed opposite her furnaces in a collision, and water entering the vessel caused the fire which burned the vessel and her cargo and she sank. It was held that the fire

was but an incident to the collision, against which the owners could not urge the Fire Statute defense, particularly since the vessel sank and it could not be determined what part of the cargo was lost from fire.

But here the case is quite different indeed: Must an owner reasonably anticipate that if his ship is in collision the other vessel will be carrying an inflammable cargo which will be discharged onto his vessel and catch fire and destroy his vessel and its cargo?

Petitioner respectfully submits such a result from a collision is far more unlikely and unforeseeable than the Court of Appeals held here was not reasonably foreseeable, namely that a shipper and carrier of toxic, inflammable cargo could not reasonably foresee that as a direct result of carriage of that cargo forward and next to the ship's skin it would be released by a collision and consume people and property.

**5. After finding that the collision was caused by negligence of the officers and crew to which under no circumstances the owner could be privy, nor of which could it have had knowledge, the Courts below denied limitation of liability to petitioner on the ground that it had not exercised due diligence to make its vessel seaworthy because it had manned the vessel with an incompetent crew. The evidence showed that the officers and crew were properly trained and skilled with many years of experience and were fully licensed.**

**The decision of the Court of Appeals is contrary to applicable decisions of this Court and of other Courts of Appeal on an important question of federal law.**

Above it has been shown that the specific facts of crew's negligence causing the collision found by the Courts below preclude the conclusion that petitioner was a party to such negligence. They establish that it was not guilty of *personal neglect.*

After alluding to its findings of negligence, as further ground for its denial to petitioner of limitation of liability the trial Court (followed by the Court of Appeals) held that petitioner had rendered the ship unseaworthy by manning it with an incompetent crew.

It is submitted that such a conclusion must have at least a scintilla of evidence to support it and that here there was none: The captain had been in command of vessels for many years, R. 1491-1494, as had the chief enginer served for years fully licensed as an engineering officer, R. 2165-2167, and each of the other officers had had proper licenses with unblemished records after many years of service. The crew was similarly well qualified; only the assistant electrician was making his first voyage, and he had had electrical schooling before. R. 2710-2711.

It has long been settled that an owner who has selected competent members of a crew cannot be denied limitation for their acts of negligence. *Craig v. Continental Insurance Co.*, 141 U.S. 638, 12 S.Ct. 97 (1891); the *Erie Lighter 108*, 250 F. 490 (D. N.J. 1918); *Rautbord v. Ehmann*, 190 F.2d 533 (7 Cir. 1951); *The James Griffiths*, 84 F.2d 785 (9 Cir. 1936).

In *The Eagle* (*Selig v. Brindle*), (CCA 9, 1923) 289 F. 661, 662, the vessel was in charge of a young but licensed master. The Court held:

> "We find no fault can be imputed to the Wildwood from the fact that her master was but 19 years of

> age. . . . *The master had duly received his license, and the owner was justified in placing the vessel in his charge.*" (Emphasis added.)

Nor was there the least proof that petitioner had knowledge of any alleged mechanical defects, and it goes without saying an owner must be privy to a *causative* defect for limitation to be denied. *Providence & N.Y. SS. Co. v. Hill Manufacturing Co.*, 109 U.S. 578, 3 S.Ct. 379 (1883).

Negligence of the crew cannot be *imputed* to an owner. Please see the cases above referred to and *La Bourgogne*, 210 U.S. 95 at 122, 28 S.Ct. 664 (1908).

We respectfully submit the decisions below depriving petitioner of limitation are insupportable in law and directly in conflict with the Court of Appeals for the Fifth Circuit's own decision in *Saskatchewan Government Ins. Office v. Spot Pack*, 242 F.2d 385 (5 Cir. 1957), as well as *The South Coast*, 71 F.2d 891 (9 Cir. 1934), cert. den. 293 U.S. 627, 55 S.Ct. 347 (1935), *The Annie Faxon*, 75 F. 312 (9 Cir. 1896), and *The Tommy*, 151 F. 570 (2 Cir. 1907).

Certainly the mechanical defects found were minor in nature, and could easily have been repaired by the crew. *Porto Rico Lighterage Co. v. Capitol Construction Co.*, 287 F.2d 507 (1 Cir. 1961). Necessary repair parts were on board. R. 4859-4863, etc.

The decisions below clearly disregard this Court's decision in *Coryell v. Phipps*, 317 U.S. 406 at 412, 63 S.Ct. 291 at 294 (1943), where it was held,

> ". . . One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred . . . during the period of storage, unless 'privity' or 'knowledge' are to become empty words . . ."

**6. The decision of the Court of Appeals affirming that of the trial Court in wholly absolving the BEREAN from causative fault is contrary to applicable decisions of this Court and of other Courts of Appeal, upon important questions of federal law.**

**The undisputed physical facts and the admissions of the BEREAN's pilot as a matter of law established that the BEREAN was causatively at fault not only in failing to keep a proper lookout but also for her excessive speed, her failure to observe the Rules for passing, and her failure to take proper measures to avoid collision immediately upon apprehending the danger of collision. Holding such plainly established violations of the statutes and Rules enacted to prevent collisions at sea and to minimize their consequences not causative or not faults, is contrary to established law and violates recognized standards of navigational care.**

> "The testimony of a witness which is positively contradicted by the physical facts cannot be given probative value by the court." — Lovas v. General Motors Corp., 212 F.2d 805 (6 Cir. 1954). To the same effect, Bordas & Co., et al. v. Serrano, et al., 314 F.2d 291 (1 Cir. 1963); Dietz v. Greyhound Corp., 234 F.2d 327 (5 Cir. 1956), cert. den. 352 U.S. 918, 77 S.Ct. 218; O/Y Finlayson-Forssa A/B v. Pan Atlantic SS. Corp., 259 F.2d 11 (5 Cir. 1958), cert. den. 361 U.S. 882, 80 S.Ct. 153; Atchinson, Topeka & Santa Fe Ry. Co. v. Hamilton Bros., 192 F.2d 817, 822 (8 Cir. 1951); Whittington v. Mayberry, 190 F.2d 703 (10 Cir. 1951).

Of course petitioner does not dispute that its vessel was wrongfully on its port side of this narrow channel at the

time of collision, though such might reasonably have been found not causative fault since afterward it was found securely anchored by both anchors, with ample scope of chain out to each to have stopped the vessel.

What petitioner does most earnestly urge is that on the findings made by the trial Court actually supported by admissible evidence, the indisputable physical facts, and the admissions of the BEREAN's witnesses, that the case is most plainly one where the decisions below are contra to many applicable decisions of this Court and of other Courts of Appeal on important rules designed to prevent just such casualties as this.

This case cries out for the application of the rule that a Court lawfully cannot disregard physical facts and give any credit to contrary oral testimony: The pilot of the UNION RELIANCE, her two helmsmen who were on the bridge, and her chief officers and two leading seamen who were at the anchors all had their mouths stopped by death; the two third mates were dispatched from the bridge before the collision. The only possible witness from the UNION RELIANCE to all the navigational events occurring within the less than four minutes before impact was the captain. And this lone witness was himself not only claiming against petitioner for large sums for personal injuries; his testimony was discredited by contradictory statements contained in a report made to the vessel's owners, pursuant to Chinese law, within 24 hours after the collision. He was himself liable under Chinese law for any personal negligence to the families of the deceased crew members. (Please see Appendix F for this Chinese law.)

The BEREAN logs showing the time of the collision were falsified (showing the collision happening more than

a minute later than it admittedly occurred), she had no lookout, and her pilot's account of where and how the vessels struck is completely disproved by the places at which the UNION RELIANCE's anchors and large piece of metal torn from the BEREAN were later found. Her junior mate (while corroborating the pilot on his admissions of what are gross faults of navigation) left the bridge before the impact, and her captain ran onto the bridge just before the collision (and was dead before trial from acrylonitrile poisoning and did not testify in court).

There was therefore really only one witness from each ship to the vessels' navigation. The self-interest of each to avoid blame is manifest.

*Findings of the Trial Court Material to its Decision and Contrary to the Physical Facts*

1. That the rudder of the UNION RELIANCE "froze" at 5 degrees port when it was put over to make the turn at Beacons 75 and 76, at 11:10 p.m., and that her course never altered thereafter until collision impact, at 11:13½, when the vessel had almost stopped.

As set forth in detail in the Statement of the Case, the place of collision was not less than 3,000 feet below the turn, and it is a manifest impossibility for a 496-foot long vessel with her rudder to port to travel a half-mile in a 400-foot wide (bottom width) channel without grounding.

2. That the BEREAN was aground on the east bank and stopped when the UNION RELIANCE struck her.

The places where the UNION RELIANCE anchors were found, the lengths of chain out to each anchor, the place where the large piece of metal from the BEREAN'S port

bulwarks was found at least 150 feet upstream from the port anchor, and the bank indentation opposite the metal established the collision occurred *after* the UNION RELIANCE was and for some time had been clear across the channel center-line while the BEREAN was still moving ahead and *before* she went aground. Appendix H diagrams the physical facts.

3. That the pilot on the BEREAN saw everything a bow lookout could have helped him see and that the BEREAN'S lack of lookout could not have been causative. The pilot testified the BEREAN was aground when the UNION RELIANCE crossed over and struck his vessel.

The locations of, and the lengths of chain out to, the anchors of the UNION RELIANCE, establish it was on the same side of the channel as was the BEREAN for no less than one minute before the collision (assuming a mean speed of 8 knots to run the 800-foot length of starboard chain, such speed itself for a 9 knot ship with braked chains not being physically possible) and probably for two and a half minutes (giving full credence to the BEREAN'S pilot's testimony of going full astern at 11:11 when he heard the anchor chain running and to the Court's finding that the impact was at 11:13½). Appendix H.

4. That the vessels were three miles apart when the BEREAN saw the UNION RELIANCE too close to her starboard bank in the turn, and one-quarter of a mile apart when the BEREAN heard the anchor chain running and put her engines full astern. The time for the first was found to have been at 11:10 p.m., for the second 11:11 p.m., for the collision 11:13½. The speed of the UNION RELIANCE 9 to 10 knots, of the BEREAN 13 to 14 knots.

Manifestly to close 2¾ miles in one minute was an impossibility, and even to close the three miles to collision impossible, for the combined speeds of the two vessels would have had to have been 50 knots for the three minutes instead of the 24 knot maximum found. Equally irreconcilable with the findings that each vessel had little or no way on at time of impact is the one-quarter mile distance finding. For the vessels to close 2500 feet in 2½ minutes they both would have had to have been moving at their full speeds, totalling 24 knots, at impact.

## The Plain, Causative Faults of the BEREAN

### Failure to Keep a Proper Lookout

The BEREAN had no one acting only as a lookout, either on the bow or on the bridge, while going at full speed in this narrow channel at night.

The pilot of the BEREAN claimed he kept the UNION RELIANCE under close observation from the time when he saw her too close to the bank where she would sheer and slowed his engines, at 11:10 p.m., until the impact of the collision. He confirmed this by a diagram, shown on Appendix H. (The collision impact was found to have been at 11:13½.)

He further testified (and diagrammed) that the UNION RELIANCE crossed the channel and struck his vessel as it lay stopped and aground. The physical facts establish that the UNION RELIANCE traveled down the BEREAN'S side of the channel for at least 800 feet from the place where her first anchor was dropped, for from one to two-and-a-half minutes before the collision, and the collision was of course on the east side of the channel.

Had the BEREAN seen what she could and should have seen she obviously could have avoided collision by going to her port instead of to her starboard and could have safely passed in this 400-foot channel west of the UNION RELIANCE.

Such navigation as that of the BEREAN has been held grossly at fault by this Court in *The New York*, 175 U.S. 187, 20 S.Ct. 67 (1899), where it was said:

> ". . . Her officers failed conspicously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout,"

citing *The Sea Gull*, 23 Wall. 165 and the *Sunnyside*, 91 U.S. 208, with which decisions those of the Courts below conflict as well as also with the decisions of this Court in *The Oregon*, 158 U.S. 186 (1895) and *Chamberlain v. Ward*, 21 How. (62 U.S.) 548 (1859). Directly contra also is *The Richard J. Barnes*, 111 F.2d 294 (2 Cir. 1940).

Pertinent here too is the comment of this Court in *Haney v. Baltimore Steam Packet Co.*, 23 How. (64 U.S.) 287, 291, 16 L.Ed. 562 (1860), where it was claimed the schooner suddenly changed course and ran under the steamer's bows:

> "This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false."

### The Immoderate Speed

The U. S. Engineers regulations for navigating this narrow channel required "A vessel shall reduce its speed . . . when approaching another vessel in motion . . ." Violation

of an Engineers' regulation is a statutory fault. *The William A. Paine,* 39 F.2d 586 (6 Cir. 1930).

The inbound BEREAN saw the outbound UNION RELIANCE when the vessels were six miles apart and of course approaching each other to pass, but she reduced her full speed only upon seeing the UNION RELIANCE in obvious difficulty when the vessels were a mile apart.

Plainly the regulation requires reduction to a safe speed for passing *well before* danger of collision exists, fully applicable here being the settled law, referred to below, that avoidance measures must be taken in time and cannot be delayed until they obviously cannot prevent a collision.

Just as plainly the continued full speed of the BEREAN in this narrow channel right up to the time when, as the Court found, her pilot became "apprehensive" of a collision, made necessary her desperate maneuver of trying to stop by running herself aground, proof indeed of excessive speed. And of course the physical facts above adverted to establish her speed was such she actually was unable to stop.

Directly contra to the decisions here is *A. H. Bull S.S. Co. v. Chesapeake S.S. Co. of Baltimore City (Evelyn-City of Richmond),* 101 F.2d 599, at 601, 1939 A.M.C. 132 (4 Cir. 1939), where, following *The Acilia,* 4 Cir., 120 F. 455, it held:

> ". . . 'Full speed in these dredged channels, when about to pass other vessels, is undeniably a fault which increases every risk of navigation. Appleby v. The Kate Irving (D.C.), 2 F. (191), 924.' "

*Failure to Observe the Rules for Passing*

The Inland Rules require passing signals to be blown and accepted before vessels pass, and a vessel cannot law-

fully change her course before her proposal has been accepted by a return signal. 33 U.S.C. § 203 (Inland Rules, Rule 1).

Here the BEREAN, well-knowing the UNION RELIANCE was in difficulty and could not safely pass port-to-port unless she extricated herself, nevertheless blew a one-blast signal proposing such a passing. Without waiting for or receiving a reply, she turned to her starboard to shape her course for the passing proposed.

Holding such conduct lawful is directly contrary to this Court's decision in *The Victory,* 168 U.S. 410, 426-7 (1893), and numerous decisions of Courts of Appeal, including *The Felix Taussig,* 5 F.2d 612 (9 Cir. 1925) and *The Poling Brothers,* 55 F.2d 921 (2 Cir. 1932).

That it was a causative fault plainly appears: this prior turning to starboard (as the BEREAN pilot intimated) probably led the BEREAN to attempt to run aground on her starboard bank and thus head directly into collision, and certainly to some extent hindered her from going to her port, which in two minutes could in all likelihood have been done from mid-channel and the collision avoided.

*Failure Promptly to Reverse Her Engines and Take Avoidance Measures*

Two and a half minutes before impact, the trial Court has found largely upon the testimony of the BEREAN, the anchor chain running out from the UNION RELIANCE was heard, the UNION RELIANCE'S backing signal of three blasts was blown and heard, and the BEREAN only then put her engines full astern. At that time she knew collision was "imminent".

One minute before she had observed the UNION RELIANCE too close to her starboard bank, knew the

UNION RELIANCE would sheer to port, and knew collision was possible. The trial Court held that at that time the pilot and third mate in charge of the BEREAN'S navigation "watched her swing to her port and became slightly apprehensive". In spite of such knowledge of possible collision or "slight apprehension" the BEREAN only reduced her engine speed and in fact turned in the direction of the port-moving UNION RELIANCE.

Freeing the BEREAN from fault under such circumstances is directly contrary to the decision of this Court in *The New York*, 175 U.S. 187, 20 S.Ct. 67 (1899). In that case a vessel being navigated thus was condemned, in this language:

> "Nothing is better settled that if a steamer be approaching another vessel which has disregarded her signals, or whose positions or movements are uncertain, she is bound to stop until her course be ascertained with certainty."

A frequently followed statement of this basic rule of law designed to prevent collisions of vessels which the BEREAN clearly violated is the following, by the Court of Appeals for the Second Circuit in *A. H. Bull SS. Co. v. United States*, 34 F.2d 614, 1929 A.M.C. 1175 (2 Cir. 1929):

> "But her duty began before. Her signal had not been answered, and she could not in the nature of things know what the Chinook proposed to do. Under such circumstances a master is bound to stop his way. The New York, 175 U.S. 187, 201, 202, 20 S.Ct. 67, 44 L.Ed. 126; The Albert Dumois, 177 U.S. 240, 251, 252, 20 S.Ct. 595, 44 L.Ed. 751; The Munaires, 1 F. (2d) 13, 15 (C.C.A. 2); U. S. v. Grant, 11 F.(2d) 700 (C.C.A. 1). There is no more important rule, since vessels, though not quite dead, will so reduce

their speed that the collision, if it occurs, will be insignificant, as certainly would have been the case here. Had the Clare done her duty shortly after her first signal—that is, as soon as she was in doubt as to the Chinook's navigation—this collision would not have happened. If she had done it as soon as the Chinook began to swing upon her course, it probably would not have happened. Instead of this, she tried to change the situation to a starboard passing, a hazardous effort at best, when no hazard need have arisen, had she been properly alive. Masters who choose to divine the purposes of other vessels and keep on, may avoid the charge of overcaution, but they take their chances. If they escape, well and good; if they fail, their owners pay."

The decisions below are contrary to settled navigational law also in failing to hold the BEREAN for *delay* in taking measures to avoid collision *immediately* upon her becoming "apprehensive", as put by the trial Court. A recently decided case with which the decision below is thus in direct conflict is *Petition of Oskar Tiedemann & Co.*, 289 F.2d 237 (3 Cir. 1961). Many others of course could be cited.

## CONCLUSION

A writ of Certiorari should be granted to review the decision of the United States Court of Appeals herein.

Respectfully submitted,

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APPENDIX A

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21367

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S.A., ET AL.,

Appellants,

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,

Appellees.

*Appeal from the United States District Court for the Southern District of Texas.*

(July 27, 1966.)

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

KILKENNY, District Judge: This is the story of another maritime tragedy resulting in heavy loss of life, severe personal injuries and property damage. On November 7, 1961, about 11:00 P.M. the Chinese Ship M/V UNION RELIANCE (RELIANCE), was proceeding outbound, and the Norwegian Ship M/V BEREAN (BE-

* Of the District Court of Oregon, sitting by designation.

REAN), which was inbound, collided on the east side of the Houston Ship Channel (Channel). The night was clear, the visibility good, with a northerly wind of approximately eight miles per hour. The ships caught fire, the fire aboard the BEREAN was extinguished within a matter of hours, while the RELIANCE remained ablaze, blocking the channel until November 10th when it was towed to and anchored in Galveston Harbor by the United States Corps of Engineers.

## THE LITIGATION

After the towage, the United States filed a libel *in rem* against the RELIANCE, seeking the immediate sale of the vessel, the recovery of expenses incurred in removing the vessel from the Channel and in safeguarding her while at anchorage. China Union Lines, Ltd. (China Union), owner of the RELIANCE, filed a petition for exoneration, or limitation of liability, and obtained the customary order prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding. In the petition, China Union elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. The court appointed a salvage master and authorized him to undertake the steps necessary to extinguish the fire in the vessel's holds and bring her to port to discharge the remaining cargo, preparatory to sale.

In other proceedings, in the same court, China Union filed its libel against the BEREAN. A. O. Andersen & Co. (Andersen), the owner of BEREAN, appeared, claimed the vessel and answered in cross-libel against China Union. Mitsubishi International Corporation, et al, (Mitsubishi), the owners and underwriters of the lost and damaged cargo aboard the RELIANCE, filed a libel against BEREAN and

her owners. Likewise, American Cyanamid Company (Cyanamid), the owner of the only cargo lost aboard the BEREAN filed its libel against the RELIANCE. The Consul General of the Republic of China (Consul General), sought recovery for the injuries to, and deaths of, the officers and members of the crew (Lan Jing-Chau) of the RELIANCE against both vessels. Lucy Duncan (Duncan), as widow, executrix and sole beneficiary of Captain Duncan, channel pilot, also killed as a result of the collision, sought recovery against RELIANCE and her owners.

Separate libels were filed directly against Cyanamid, as owner of the BEREAN cargo, by China Union; the owners and underwriters of the cargo aboard the RELIANCE, and various other parties. These libels were filed on the theory that the acrylonitrile carried by the BEREAN, was of such a dangerous nature and propensity as to render the shipowner liable to said parties.

This complexity of libels, with its jungle of issues, was wisely consolidated by the trial judge (judge). Prior to trial, and after hearing, the judge directed payment of certain salvage claims and deferred action on the remainder of such claims pending a decision on the issues of liability.

After trial, and the entry of detailed findings and conclusions, the judge entered an interlocutory decree directing, among other things, that:

(1) the petition of China Union for exoneration from, or limitation of, liability be denied;

(2) reimbursement be made to the trustee, out of funds in the Registry of the Court, for the trustee's reasonable expenses, including trustee and attorney fees;

(3) payment be made of the claim of the United States from funds remaining in the Registry of the Court in the sum of $27,219.38, with interest;

(4) China Union recover nothing from the cargo of the RELIANCE as general average;

(5) the order therefore entered enjoining prosecution of litigation against China Union on any claim growing out of the collision be vacated;

(6) China Union recover nothing against respondent Andersen or the BEREAN, that its libel be dismissed with costs and that Andersen, as cross-libelant, recover from RELIANCE and cross-respondent, China Union, the damages sustained by it in consequence of the casualty;

(7) Mitsubishi, and other such libelants, the owners of parcels of cargo on the RELIANCE, recover nothing against the BEREAN or her owner Andersen or Cyanamid, and that such libel be dismissed with costs;

(8) Cyanamid recover from the RELIANCE and her owner China Union the damages sustained in consequence of the casualty, and that the cross-libel by China Union against Cyanamid be dismissed with costs, together with any other intervening libels or cross-libels aganist that company be dismissed;

(9) the Consul General, representing the next of kin of the dead Chinese seamen and those that were injured, recover nothing against BEREAN or Andersen, and that the libel be dismissed;

(10) the representative of the deceased and injured crewmen recover from the RELIANCE and her owner China Union, all damages sustained by each of them, less one 15% reduction for contributory fault.

(11) Lucy Duncan, the surviving wife of Captain D. O. Duncan, recover from the RELIANCE and her owner China Union, such damages as sustained by reason of the death of her husband.

(12) Armement Deppe, owner of the SS LUXEMBOURG, recover nothing from the BEREAN or her owners Andersen & Co.

China, Mitsubishi, the Consul General of the Republic of China, and Armement Deppe, S.A. appeal

## FINDINGS

The detailed findings and conclusions of the judge occupy twenty-five pages of the record. Putting aside certain background material and formalities of no particular significance on this appeal, the judge, after a trial of approximately one month, found that the following facts, with others to be later discussed, were supported by substantial evidence.

## THE VESSELS

The RELIANCE was a steel motor ship, built in the United States in 1940, approximately 496 feet in length and designed for the carriage of dry cargo. The ship's engines were designed to give approximately 240 revolutions per minute which, with the existing gear ratio should give approximately 80 revolutions per minute to the shaft. However, by reason of age, wear and poor maintenance, the engines were not capable of producing this efficiency. To change the direction in which the power is imparted to the propeller shaft, it was necessary to stop the engines by cutting off the fuel supply, then change the cam setting and restart the engines. The design permitted and,

for that matter, contemplated one pair of engines to be kept running ahead and the other pair to be kept running astern at all times while the vessel was in pilot waters. When desirable all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was neither a difficult nor a time consuming operation and could be accomplished by competent engine room personnel in a matter of approximately one minute. She was equipped with a hydraulic steering system, located in the steering engine room, not in the main engine room. Hydraulic rams, equipped with fluid under great pressure, actuated the rams and served to move the rudder in the desired direction. Two separate steering systems were available to force the fluid through the system and against the rams, while one was in use the other served as a stand-by. The principal unit of the steering system was a large pump powered by an electric pump utilizing a 50 h.p. electric motor. A number of auxiliary pumps and motors were available, but only a so-called "replenishing" pump was of any importance. In normal operation the hydraulic fluid escaped from the system and was collected in the sump tank, then lifted by means of the "replenishing" pump to an overhead replenishing tank from which, by gravity, it was fed back into the system for further use. This pump was powered by a small electric motor. Approximately 35 gallons of fluid was required to fill each system. While minor leaks were expected, in normal operation only small quantities of fluid should be required at quite infrequent intervals.

The BEREAN was built in Norway and delivered to her owner in April, 1961. She was 508 feet in length, powered by one 9000 h.p. diesel engine. Her navigating bridge is in the forward part of the afterhouse, some 350

feet from the bow. Her cargo space is divided into 42 tanks, designed and equipped to carry many varieties of bulk liquids. She had been engaged in the chemical trade for several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The skin of the ship constituted the outer wall of certain of her wing tanks. These tanks were not protected by cofferdams or other protective voids.

## CARGOES AND MOVEMENTS PRECEDING THE CASUALTY

Following her purchase in April, 1961, from Greek interests, the RELIANCE sailed from Greece, through the Mediterranean to Tampa, Florida, and thence to New Orleans. There, her captain and crew had full knowledge of the fact that extensive repairs were needed in the engine room, in particular the overhaul of the engine control department. An officer of the petitioner and a marine surveyor flew from New York to New Orleans to supervise these repairs. While those repairs were underway, the main engines were opened and found badly worn and eroded. Since repairs were not readily available the old heads were reinstalled. A full report was made to the owners of the work and other work which was recommended by the marine surveyor to place the engine room in proper condition. Departing New Orleans the RELIANCE proceeded to Houston, thence through the Panama Canal, thence to Japan and Taiwan, where additional engine repair were made. There, her captain, chief engineers and others of her crew were replaced and the officers and crew who were aboard at the time of the casualty took over. She discharged a part of her cargo at Los Angeles and there received five

of the number of piston heads that were needed to properly repair her main engines. However, the heads were not installed. She arrived in Houston on November 5th, discharged part of her cargo and left the Houston dock at 6:30 P.M. November 7th. Unassisted by tugs, she proceeded outbound, with Channel pilot Duncan at her bridge. At approximately 8:30 P.M. while she was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system, which was in use at the time. The engines were stopped, the anchors were dropped and the vessel brought to rest. Both the starboard and port steering systems were disconnected. After a test had shown that the port system was operating properly, the anchors were lifted and the vessel got underway at approximately 9:00 P.M. Her crew then attempted to repair the starboard steering system. On examination, it was found that the brushholder on the electric motor which operated the starboard steering pump was out of order. The chief electrician repaired the damaged part, but did not replace the part in the engine. As a result, the starboard steering system was not thereafter in operation. Apparently the port steering system was functioning properly until she started across the channel.

On November 6, 1961, the BEREAN loaded 1400 tons of acrylonitrile in Good Hope, Louisiana. The officers of the vessel directed that the cargo be placed in the forward most cargo tanks. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. A distinguishing feature is that it gives off highly toxic fumes. The fumes, in relatively weak concentrations, will cause illness to a person exposed over a long period of time. A single exposure may cause illness or death if there is a sufficiently high concentration of the material. The symptoms of poisoning are similar to those of cyanide. Under Coast Guard Regulations

(Regulations) acrylonitrile was, at the time of the casualty, and still is, classified under Regulations as a Grade C flammable fluid, as is gasoline, benzine, naphtha and other such products. The BEREAN also carried a mixed cargo of other bulk liquids. She arrived at Galveston Bar at approximately 9:15 P.M. on November 7th. Channel pilot Lary boarded her and assumed active control of her navigation as she proceeded inbound toward Houston.

From the sea buoy to the point of collision, and beyond, the channel passes through the open waters of Galveston Bay. The channel was dredged to a depth of 36 feet and a width of 400 feet, and is relatively straight as it crosses the Bay. It was the custom and practice of most vessels, in favorable weather, to navigate this portion of the channel at "full ahead," except when passing other ships. From the sea buoy to the point of collision, pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a major portion of the time, although he was in his cabin before the emergency. He returned to his bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour. It was his duty to proceed to the bow of the ship to serve as a lookout for another hour, before returning to duty at the wheel. However, when weather and visibilty were good and the vessel was proceeding routinely, it was the custom and practice for the helmsman to have a 10 to 15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose. Normally, in passing through the area being navigated by the BEREAN, it was not customary to have an anchor watch standing by, in that there was no occasion to use an anchor to maneuver until after reaching Morgan's Point, some distance inward.

## THE COLLISION

The RELIANCE was navigating at a speed of 9-10 knots over the ground, when she made the bend at Five Mile Point. Each vessel saw the lights of the other about that time, BEREAN blew a one blast signal, which was not answered by RELIANCE. In negotiating the bend, RELIANCE navigated some what to her starboard side of the channel. The pilot of the BEREAN noted and commented upon this maneuver. However, the maneuver was, to them, of little significance and did not cause the vessel to sheer away from the starboard bank, nor did it result in loss of control of her steering. In making the turn the RELIANCE pilot ordered her rudder five degrees to port. The rudder responded to the movement of the wheel and the vessel started to turn to port. At this highly important point, the steering gear of the RELIANCE failed; with the frozen rudder in a five degree port position. The quartermaster was unable to move the wheel in either direction and she continued to swing under that rudder setting. Thereafter, she did not straighten her course. After her captain, pilot and quartermaster determined that the wheel would not respond, her bridge notified the engine room to reduce speed and shortly thereafter to stop. On watch was the third mate who was ordered by the captain to find the chief engineer and advise him of the rudder failure. Her engine room was directed to give full speed astern. The pilot of the RELIANCE, recognizing the imminent danger, ordered her first starboard anchor to be dropped and shortly thereafter ordered her port anchor dropped. At this point, approximately 11:00 P.M., the RELIANCE sounded three blasts on her whistle. This was the only whistle signal she sounded. Efforts to transfer the steering control on her bridge from the telemotor system to the gyro-pilot failed

and she continued to swing to her port, completely out of control. Prior to the emergency the RELIANCE'S four engines had all been coupled for maximum forward speed. Under orders for full power astern, the engine room reversed one set of two engines and coupled the same to the propeller shaft to give astern power. This, however, did not control the vessel's swinging to port, with some headway and she continued to have headway until she collided with the port side of the bow of the BEREAN. The remaining two engines were never reversed and coupled to the shaft. The other findings, with reference to fault, lack of fault, privity and other issues, we shall discuss in connection with the assignments of error.

## CREDIBILITY OF WITNESSES

The judge noted that several of the principal witnesses for the petitioner were impeached in connection with subjects of great importance. He pointed to the withholding of an important report by the petitioner, which report had received the approval of the captain. The report was entirely inconsistent, in a number of important respects, with the theory advanced by the RELIANCE. He also pointed to the impeachment, on important testimony, of the chief engineers and chief electrian of the RELIANCE.

## ASSIGNMENTS OF ERROR

Putting aside, for later discussion, the claims against Cyanamid and the claim of the United States, we summarize the assignments of error in the ensuing fashion:

I. That the judge erred in exonerating the BEREAN, because the record shows that she failed to stop, blow proper signals or proceed with caution after she first recognized that there was a risk of collision.

II. That the judge erred in exonerating the BEREAN, when the record shows that she failed to proceed at a moderate rate of speed on meeting a vessel that she was to pass.

III. That the judge erred in exonerating the BEREAN, when the record shows that she failed to keep a lookout on the bow or a proper lookout on the bridge.

IV. That the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

V. That the judge erred in exonerating the BEREAN, when the record disclosed that she was unseaworthy and at fault for transporting a poisonous, explosive and flammable cargo in her forward wing tank, next to the skin of the ship.

VI. That the judge erred in denying petitioner limitation of liability under 46 U.S.C. § 183 (a), against all claims made against it.

VII. That the judge erred in holding the petitioner and RELIANCE liable for loss and damage by fire to the RELIANCE' cargo, because the fire orignated from the other vessel and because petitioner, as a carrier, was exempt from such liability under the Bills of Lading and by virtue of 46 U.S.C. § 1304 (2) (b), and 46 U.S.C. § 182.

## ASSIGNMENT I

I. On this assignment, appellants charge that the BEREAN violated two of the Inland Rules[1] in failing to stop, blow proper signals or proceed with caution after she first

[1] 33 U.S.C. § 203, Rule I.
33 U.S.C. § 203, Rule III.

recognized, or should have recognized, that there was a risk of collision.

It is contended that the BEREAN violated Rule I, when she (1) blew a one blast signal, proposing a port-to-port passing at a time when those in charge were in doubt as to the feasibility of such a passing, and (2) turned right two or three degrees before receiving a reply to her one blast signal. Rule III was violated, say appellants, when the BEREAN failed to blow a danger signal and reverse her engines immediately upon seeing the RELIANCE in a position that might force her to sheer across the channel. Practically all of appellants' arguments on this assignment are based on an assumption that the RELIANCE, did sheer off its starboard bank and that such fact was observed, or should have been observed, by Pilot Lary of the BEREAN. The judge saw and observed the witnesses and chose to believe Lary's version of what occurred and the reasons for his action, or lack of action, at the time. While Lary observed the position of the RELIANCE when the vessels were approximately one mile apart, he had no feeling that a collision was imminent until he heard the whistles of the RELIANCE and the sound of the anchor letting, at which time he recognized an emergency and gave a full speed astern on the BEREAN'S engines and a hard right rudder to put her aground in the mud bank at his starboard side of the channel. On these issues, the judge found that each vessel saw the other when the RELIANCE was making the bend at Five Mile Point, at which time they were approximately three miles apart. The BEREAN blew a one blast signal which was not answered by the RELIANCE. In negotiating the turn the RELIANCE navigated somewhat to the starboard side of the channel. This maneuver was noted and commented upon by Lary, but he considered

it of little consequence. The maneuver did not cause the RELIANCE to sheer away from the starboard bank, did not cause loss of control of steering and did not precipitate the casualty. Prior to sighting the RELIANCE, approximately three miles away, the BEREAN had been navigating at "full ahead" and making thirteen to fourteen knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to one-half and shortly thereafter to "slow ahead." It was at this time that the one blast signal was given by BEREAN. While the one blast signal was not answered, Lary fully expected to make a normal port-to-port passing. He was somewhat apprehensive after watching the RELIANCE swing to port and turned the BEREAN slightly to starboard, still expecting to negotiate the port-to-port passing. Lary's order for full speed astern on the BEREAN'S engines and a hard right rudder were put in immediate effect. At this time the vessels were approximately one-fourth of a mile apart and closing on each other. The judge found that the BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger and that the BEREAN was not at fault in failing to undertake a starboard-to-starboard passing. The judge found that she had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed in which such a passing might have been accomplished in safety. These findings are fully supported by the record and, in particular, by the testimony of the Pilot Lary and the Mate Haugen. The piercing searchlight of hindsight, so skillfully employed by counsel for appellants, may point to other maneuvers that might have been taken successfully by the BEREAN. However, both we, and the judge, must interpret the record from the viewpoint of a prudent pilot under the circumstances then and there

existing. Lary's conduct must be judged with reference to the circumstances at the time and not by a cool estimate of possible danger which might be formed after the event.

It is conceded that vessels, in this channel, are required to pass port-to-port—that meeting vessels must approach each other and pass by turning to starboard two or three degrees. This is in line with a judicially recognized custom in the channel. *Royal Navy of Italy v. Standard Oil Co. of N.J.*, 27 F.2d 331 (5th Cir. 1928). The cases cited by appellants, on this assignment, simply do not support their position. For example, the decision in *THE SAND-MASTER*, 105 F.2d 1009 (2d Cir. 1939),[2] dealt with a situation where the Inland Rules and a special statute were confused by the pilot; this confusion led to a collision involving three vessels. The judge there held that the narrow channel rules did not apply to a section of the East River, near Brooklyn Bridge, but that navigation in that section was governed by the East River Statute. Obviously, that decision is of no assistance. On the other hand, the case on which the lower court and BEREAN rely, *VICTORY-PLYMOTHIAN*, 168 U.S. 410 (1897), is of compelling significance. The facts in that case are almost identical with the facts in this record. A lengthy discussion of that decision is unnecessary. It is enough to say that the decision is in full and complete support of the findings and conclusions of the judge on this issue. Other cases cited by appellants, such as *RICHARD J. BARNES*, 111 F.2d 294 (2d Cir. 1940); *A. H. Bull v. United States*, 34 F.2d 614 (2d Cir. 1929); *MELROSE-*

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[2] For factual statements see District Court opinion, 26 F.Supp. 64. This decision is reported **sub nom Construction Aggregates Co. v. Long Island R. Co.**

*SANDCRAFT*, 237 F.2d 884 (2d Cir. 1957), and others, involved crossed signals or a change of course of one of the vessels. Those cases are no more in point than the *SANDMASTER*, *supra*. We conclude that the findings and conclusions of the judge, on this issue, are supported by substantial evidence.

## ASSIGNMENT II

Appellants charge BEREAN with failing to proceed at a moderate rate of speed on meeting the RELIANCE, in violation of 33 C.F.R., § 207.180 (e) (3) (ii).[3] Appellants theorize that the BEREAN kept traveling at full speed ahead long subsequent to the time when, on seeing the RELIANCE in a position on the bend from which it was likely to sheer, she should have reduced her speed and reversed her engines. The judge's findings are in direct conflict with appellants' assertions. He found that the BEREAN observed the RELIANCE as she was in the turn of the channel about three miles away. Prior thereto, the BEREAN had been navigating at full ahead, or approximately 13 to 14 knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to "one-half" and shortly thereafter to "slow ahead." At this time the BEREAN gave the one blast signal, which was not answered by the RELIANCE. True enough, the pilot and watch officer of the BEREAN observed the RELIANCE somewhat close to her starboard bank of the channel and watched her swing to port, at which time they became somewhat apprehensive. The BEREAN, at this time, turned sightly to starboard. However, it was not until the BEREAN heard the three blast signal from

[3] "A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up . . ."

the RELIANCE, and heard the sound of the anchor letting go, that the pilot of the BEREAN recognized an emergency. He forthwith blew three blasts in return, immediately ordered full speed astern on the BEREAN'S engines and gave her a hard right rudder, intending to put her aground. Compliance with these orders was immediate. The vessels were then closing on each other. There is nothing in the record on which the judge could find that a speed of 13 to 14 knots was not proper in the Channel. For that matter, appellant Mitsubishi practically concedes that such a speed below Morgan's Point would not be a negligent act. In any event, the district court has resolved the issue against the appellants and, in our view, such a resolution is not clearly erroneous. A prudent speed, under the circumstances, was an issue of fact for the judge, *Socony-Vacuum Oil Co. v. Smith*, 179 F.2d 672 (5th Cir. 1950).

Appellants' citations do not fit our facts. For instance, take *WM. A. PAINE*, 39 F.2d 586 (6th Cir. 1930), cited by China Union in support of its contention that BEREAN was guilty of statutory fault in proceeding at 13 to 14 knots. The *PAINE* involved an interpretation of certain regulations governing the speed of vessels through Maumee Bay Channel in the Great Lakes area. The regulation prescribed a speed of 10 miles per hour. Here, our regulation makes no mention of a maximum speed. There is no statutory speed limit in the channel applicable to the area of the collision. At the time of the collision in *DITMAR KOEL*, 65 F.2d 555 (5th Cir. 1933), the rules and regulations governing the use of the channel provided for a maximum speed of 8 miles per hour. There, the judge held that a speed of 9 knots was excessive and this circuit upheld that finding. The statutory speed

of 8 miles per hour was repealed by the adoption of the present rules. Additionally, the channel has been enlarged in depth and in width since the *DITMAR KOEL* decision.

Since we cannot say that the findings of the judge were clearly erroneous, we are governed by them. *Atkins v. Lorentzen,* 328 F.2d 66 (5th Cir. 1964). The decision in *GEORGE H. JONES,* 27 F.2d 665 (2d Cir. 1928), does not nullify the force or effect of the judge's findings against appellants on this issue.

## ASSIGNMENT III

Appellants say that the BEREAN failed to keep a proper lookout from the bridge, as well as from the bow, and in so failing, violated Article 20 of the Inland Rules, 33 U.S.C. § 221.[4] On this issue, the judge found that the BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 P.M. until the time of the collision. After so finding, the judge went on to hold that this failure did not cause, and could not have caused or contributed to, the collision. The judge found that Pilot Lary saw the RELIANCE several miles away and observed her lights constantly thereafter, and that, by reason of his familiarity with the channel, he recognized the danger at the earliest possible moment, under the then existing circumstances. He heard the only whistle given by the RELIANCE and took immediate action. During this period, Pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the

[4] "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry light or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

bridge a majority of the time. He had gone to his cabin shortly before the emergency and returned to the bridge only moments before the collision. It was the helmsman's duty to proceed to the bow of the ship to serve as a lookout for one hour after being relieved at the wheel and before returning to duty. However, a general practice was followed on the BEREAN, which permitted the helmsman a 10 to 15 minute coffee break after leaving the wheel and before proceeding to the bow, if weather and visibility permitted and the vessel was proceeding routinely. It was during this interval that the emergency arose. Both bow anchors of the BEREAN were ready to let go, but she had no one standing by the windlass to serve as an anchor watch. By reason of the nature of the channel in that area, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point. Other findings go into considerable detail on the issue of lookout.[5] The judge found that a lookout "could have done nothing more" than was done by the pilot of the BEREAN under the same circumstances and conditions.

Appellants' proctors, again in the brilliant light of considered hindsight, have carefully reconstructed the events leading up to the collision and argue that Pilot Lary could

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[5] "16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour."

"21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE."

"37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger."

not have seen what happened and that the absence of a bow lookout was, in fact, causative. It is fundamental that the judge did not have to accept a theory adopted by counsel, as against the positive testimony of Pilot Lary, the watch officer Haugen and tug captain Starkweather. It is argued that the location of the RELIANCE'S anchors, following the collision, demonstrates that she moved extremely close to her port bank at the time her starboard anchor was dropped and that she then moved back toward the center of the channel before the port anchor was dropped. This argument shows the resourcefulness of appellants' proctors, but it does not prove that a bow lookout would have been of aid to the BEREAN. Obviously, the judge had more faith in the channel course, as shown by the RELIANCE'S instruments, than in post casualty theories, advanced by proctors. Furthermore, the judge could well have believed the testimony that the position in which the starboard anchor was found did not indicate that this was the position of the anchor at the time it was first dropped. Again, we observe that the judge had an opportunity to see and observe the witnesses. We are satisfied with his analysis of the evidence. His finding that the failure to have a lookout did not cause and could not cause or contribute to, the collision is supported by substantial evidence.

*THE PENNSYLVANIA*, 86 U.S. (19 Wall. 125 (1873)), and other cases cited by appellant, do not compel a different result. Appellants would have us give birth to a rule, that every vessel guilty of a statutory fault has the burden of establishing that its fault could not, by any stretch of the imagination, have had a causal relation to the collision, no matter how speculative, improbable or remote. *THE PENNSYLVANIA* does not go that far and

this court so stated in *Compania De Maderas v. THE QUEENSTON HEIGHTS,* 220 F.2d 120 (5th Cir. 1955), *cert. denied* 350 U.S. 824 (1955). Appellants reliance on *G. B. Zigler Co. v. Barker Barge Lines,* 167 F.2d 676 (5th Cir 1948), and *Smith v. Bacon,* 194 F.2d 203 (5th Cir. 1952), place them on tenuous grounds. The decisions in *Zigler* and *Bacon* have been molded and placed in proper perspective by later decisions in *Parker Bros. & Co. v. DeForest,* 221 F.2d 377 (5th Cir. 1955), and *Atkins v. Lorentzen, supra.* Nor can appellants go outside the circuit and find comfort in authorities such as *Esso Standard Oil Co. v. THE MALUCO,* 332 F.2d 211 (4th Cir. 1964), or *Circle Line Sightseeing Yachts, Inc. v. City of New York,* 283 F.2d 811 (2d Cir. 1960). In *MALUCO* the pilot, in contrast to our situation, could not see the lights or maneuvers of the approaching vessel. If, in *MALUCO,* the judge had found that the pilot of the vessel saw everything which a bow pilot lookout could have seen, undoubtedly, the Fourth Circuit would not have reversed. The basic holding in that case was that the tug's general lookout was inadequate and that a special lookout was needed.[6] The most that can be said of *MALUCO* is that failure to maintain a lookout is not the equivalent of statutory fault, but does give rise to a strong influence that such failure contributed to the incident and imposes on the vessel a heavy burden to show, by clear and convincing evidence, that it did not so contribute. Here, the judge's findings and conclusions were within the permissible limits of that decision. We feel that the decision of the same circuit in *United States v. SS SOYA ATLANTIC,* 330 F.2d 732 (4th Cir. 1964) (1964 A.M.C. 898, affirming 213 F.Supp. 7, 1964), rendered

[6] "But if a special lookout was not needed, the tug must plead the adequacy of her general lookout in order to meet her burden." 332 F.2d 214.

a few days after *MALUCO,* is more applicable to the case before us. There, the court held that the district court findings were binding unless clearly erroneous and that the absence of a lookout, having no other duties, is not a basis for a finding of fault if the bridge actually observes what a lookout should have seen. One of appellants urges that no one aboard the BEREAN was serving as a lookout solely in such capacity and without other duties to distract him. *Circle Line Sightseeing Yachts, Inc. v. City of New York, supra,* is cited. The distinguishing feature of *Circle Line* is that the lower court failed to make a finding on whether the lookout, with no other duties, could have seen the bridge earlier and either avoided the accident or, at least, diminished its severity. Here, as previously mentioned, the trial court found, as a fact that the absence of a bow lookout not only did not cause the collision, but could not have caused or contributed to it.

A discussion and analysis of other cases cited by appellants, such as *THE OREGON,* 158 U.S. 186 (1895); *THE FELIX TAUSSIG,* 5 F.2d 612 (9th Cir. 1925), *cert. denied* 269 U.S. 560 (1925); *Poling Russell Inc. v. United States,* 196 F.2d 939 (2d Cir. 1952), and *River Terminals Corp. v. United States,* 121 F.Supp. 98 (E.D. La. 1954), would add nothing to the enlightment of the profession nor to the validity of our conclusions.

The question of a proper lookout is one of fact to be determined from all of the circumstances on the basis of common prudence, there being no fixed requirement that a vessel maintain a "bow lookout" under the facts and circumstances here presented. The finding of the trial judge on this issue was clearly within the realm of reason. The evidence established beyond doubt that the absence of the bow lookout had nothing whatsoever to do with the collision.

## ASSIGNMENT IV

The appellants claim that the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

The record supports the judge's finding that the BEREAN was not at fault in failing to have an anchor watch prior to or at the time of the collision, or in failing to drop her starboard anchor as ordered by her pilot. The evidence is clear that it was not the custom of the ships to maintain an anchor watch in the portion of the channel in question, particularly when the vessel had sufficient power, as the BEREAN had, to readily maneuver. Furthermore, the judge found that even if the anchor of the BEREAN had been dropped when her pilot ordered, this procedure would have had little, if any, effect on slowing the vessel and would not have prevented the collision. In other words, BEREAN took the quickest and most certain method of losing headway by running aground. The record shows, and the judge found, that when the BEREAN'S pilot recognized the emergency and ordered the engines full astern and a hard right rudder, he likewise ordered the starboard anchor dropped. The starboard officer who was on the bridge with the pilot immediately started to obey the order. Before he reached the bow he felt the BEREAN go aground and observed the RELIANCE bearing down on the port bow of his vessel in a manner which presented an inevitable collision. For that reason, he did not try to drop the anchor. The BEREAN ran aground on her starboard side of the channel, either immediately before or at the time of the impact. At such time, she had little, if any, headway. Likewise, the RELIANCE had lost most of her speed at this time. Appellants' argument that if the BEREAN had an anchor watch, he could have

forthwith dropped the anchor and thus stopped the BEREAN and avoided the collision, is directly opposed to the findings of the judge. There is little, if any, evidence to support this argument. For that matter, the great weight of substantive evidence is against such a contention. The dropping of an anchor when a vessel is making 8 or 9 knots would, on the record, violate good seamanship. Most of the experts were of the view that the dropping of an anchor or anchors from a vessel proceeding to five knots or more, with a view of stopping or even slowing the vessel, would be highly dangerous and probably futile. Such a maneuver would burn the brake bands and at a speed of 8 to 10 knots would result in breaking the anchor chain. No witness testified that he ever dropped an anchor under such circumstances. The expert testimony on this subject was not only convincing, but was in line with what would seem to be good common sense.

Typical of the cases cited by appellants are *THE VIRGINIA*, 25 F.2d 623 (2d Cir. 1928); *River Terminals Corp. v. United States, supra*, and the *Mariblanca Navegacion, S.A. v. Panama Canal Co.*, 182 F.Supp. 369 (D.C. C.Z. 1956), *aff'd.* 298 F.2d 729 (5th Cir. 1962). As applied to the facts of this cause, those cases give us nothing of substance. *Mariblanca* involved a defective steering gear and failure to drop anchors in the Panama Canal. That area is governed by a specific statutory requirement that anchors be in a state of readiness for letting go.[7] There, the judge held that the accident was caused by a failure of the vessel's steering mechanism and by failure of the vessel's personnel to promptly execute the orders of the pilot with respect to the engines and anchors. In the final analysis, this case merely stands for the proposition that

[7] 35 C.F.R. 4.41

an appellate court will not set aside the finding of a judge unless "clearly erroneous." *THE VIRGINIA* involved a "comedy of errors." The third officer was sent forward to let go an anchor, but dropped the wrong anchor. This required the third officer to run forward to the forecastle head and drop anchor. This he did, but dropped the starboard instead of the port anchor thereby pulling the vessel so that she sheered directly toward the ship with which she collied. The appellate court, on this issue, merely affirmed the finding of the judge. Following the same pattern is the decision in *River Terminals Corp., supra.* There, the judge found that the dropping of anchors might have avoided the collision—that the failure to drop them was at least a factor contributing to the casualty.

A discussion of other cases cited by appellants would only lengthen an opinion which, with much left to be said, is already beyond the Pale.

## ASSIGNMENT V

China Union, and Lan Jing-Chau, et al, charge that the BEREAN was unseaworthy by reason of dangerous cargo being placed in a forward wing tank, next to the skin of the ship. This assignment is related to, but must be distinguished from, the assignment of these appellants that Cyanamid was at fault in failing to warn the BEREAN of the lethal qualities of the cargo. Later, we shall treat of that charge and of China Union's standing to raise these questions.

As early as 1871 the Congress took an interest in legislation on dangerous articles or substances in commerce.[8] The

[8] 16 Stat. 440.

legislation in effect at the time of the casualty[9] empowered and directed the commander of the Coast Guard, in order to secure effective provisions against the hazards of health, life, limb or property created by explosives or other dangerous articles or substances, to, by regulation, define, describe, name and classify all explosives or other dangerous articles or substances and to establish such regulations as might be necessary to make effective the provisions of the section with respect to the descriptive name, etc.[10] The legislation further provided that the transportation, stowage or use of such articles or substances should be in accordance with the regulations. These statutes, and the regulations promulgated thereunder,[11] make it clear that the duty is placed on the Coast Guard to properly examine, analyze and classify all cargoes such as the one here in question. It did so examine this type of cargo and classified it as Grade C flammable liquid, it being placed, as previously mentioned, in the same classification as gasoline, benzine, naphtha and other such substances.[12] It was not classified as a poison either "extremely dangerous" or "less dangerous,"[13] or with having lethal characteristics. It has been said, and rightfully so, that these statutes and the regulations promulgated thereunder amount to much more than a set of prohibitions with punitive sanctions. They establish a standard of care. *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964).

The judge found that the BEREAN was not at fault in carrying acrylonitrile in her forward wing tank. The

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[9] 46 U.S.C. §§ 170, 170(a), 170(b).

[10] 46 U.S.C. § 170(7)(a).

[11] 46 C.F.R. 146.01.

[12] 45 C.F.R. 146.21-100.

[13] 46 C.F.R. 146.25-5; 146.25-10.

ship had been engaged in the chemical trade for several months following her construction, and prior to the collision carried various kinds of petroleum products and other flammable liquids in her forward wing tanks. The shell, or skin, of the ship constitutes the outer wall of certain of her wing tanks. No protective cofferdams or voids surrounded these tanks. Under pertinent Regulations those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics."[14] Acrylonitrile is similar to gasoline in its burning and explosive characteristics. In addition, it is toxic, and gives off poisonous fumes. These fumes causet illness to persons exposed thereto in relatively weak concentrations over a prolonged period of time and may cause illness or death from a single exposure if in a sufficiently high concentration. Symptoms of this poison are similar to those of cyanide.

Appellants claim that the Coast Guard was in error in not classifying acrylonitrile in the same classification as poisonous gases, or with those having lethal characteristics, as to which different regulations apply. It is said that such a cargo should not be carried in the forward tanks, or that a cofferdam or void space should have been provided between the tank and the skin of the ship. A rule that this type of material should not be carried in the forward tanks of the vessel would probably destroy a substantial segment of the carrying capacity of most tankers. The fact, if it be a fact, that "a large majority of collisions are on the bows of vessels" does not mean that the forward part of a vessel should not be used for the purpose of transporting liquids such as acrylonitrile. No custom or usage is advanced to support this argument. No Regulations were violated by placing the cargo

[14] 46 C.F.R. Part 39.

in the forward tanks. For that matter, the regulations of the Coast Guard invited the procedure which was followed by BEREAN in the stowage of this cargo. The charge that the cargo should have been stowed in tanks with a cofferdam, or void, apparently was suggested by a Regulation covering the stowage of "flammable or combustible liquids having lethal characteristics." The appellants concede that the Regulations, in effect at the time of the casualty, did not classify the chemical as a flammable or combustible liquid having lethal characteristics.

The Regulations properly distinguish between a chemical which is highly flammable and a chemical which is highly toxic or one having lethal characteristics. Of course, a chemical may be both flammable and toxic and, if sufficiently toxic, should be placed in a different classification than one which is only flammable. To be kept in mind is the fact that the Bill of Lading issued by Andersen to Cyanamid, specifically described the cargo as acrylonitrile, and that the Regulations did not classify the chemical as an explosive, or as a Class A, B or C poison. During the course of the negotiations leading up to the issuance of the Bill of Lading, the export manager of Cyanamid furnished to representatives of Andersen the pamphlet entitled, "Handling-Storage-Analysis of Acrylonitrile." The physical properties of the chemical, including its explosive limits, the fact that it was toxic and that it was flammable are set forth in the pamphlet. This is conceded by Andersen. However, it is argued that the ship, and her owner, had a right to rely on the classifications of the— Coast Guard made pursuant to the statutes and regulations, and that a stowage of cargo in accordance with such regulations, insulates the vessel and her owner against a charge of unseaworthiness or negligence in connection with such

stowage. Although the language used in *Marshall v. Isthmian Lines, Inc., supra,* p. 134, 135[15] speaking of the Regulations, was employed in connection with a factually distinguishable background, we think the rule there stated is sound, and should be applied to this charge against BEREAN and Andersen. Another statement of the same legal principle is that official duty has been legally performed. The law so presumes. *Board of Public Instr. v. Osburn,* 101 F.2d 919 (5th Cir. 1939); *Continental Bank & Trust Co. v. Brandon,* 297 F.2d 928 (5th Cir. 1962); *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14-15 (1926).

We do not believe that BEREAN and Andersen were required to inquire into the validity of the classification of the chemical made by the Coast Guard experts. As applied to the ship and her owner, there was nothing in the Cyanamid pamphlet which would require a different result.

Again, on this point, we are faced with a line of authorities that are distinguishable. Take for instance the *Petition of Oskar Tiedemann and Co.,* 289 F.2d 237 (3d Cir. 1961). The question before the judge was whether the owners of a tanker could claim limitation of liability after they allowed her to sail with tanks that had been emptied of a cargo of petroleum, but contained flammable fumes. The court found that the fumes were more dangerous than liquid cargo and that the vessel did not have proper gas-freeing apparatus and was, therefore,

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[15] 334 F.2d 134, 135.

"The whole statutory scheme is something much more than a set of prohibitions with punitive sanctions. It establishes a standard of care to which all concerned are bound, including those who do, and those who do not, wish to comply."

unseaworthy. Again, this is a case where the findings of the judge were upheld. In *C. J. Dick Towing Co. v. THE LEO*, 98 F.Supp. 455 (S.D. Tex. 1951), *aff'd.* 202 F.2d 850 (5th Cir. 1953), gasoline or some other explosive liquid had been allowed to leak into the end section of a barge. This section was not intended for cargo. The judge held that those in charge of the vessel were negligent in not properly inspecting the tow and in allowing the rake tank to be in such a condition that it was a menace and a hazard. Of course, there is no such finding before us. That the existence of gasoline or other explosive fumes, in an area of a ship not designed for that purpose, creates an unseaworthy condition, we have no doubt. No such problem confronts us. The negligent stowage of flammable cargo in a manner which violated approved methods of stowing naphthalene as delineated in the safety regulations of the Coast Guard and of the Dutch Government, was presented by the facts in the *Petition of SKIB A/S JOLUND*, 250 F.2d 777 (2d Cir. 1957), reaffirmed on second appeal 269 F.2d 68, *cert. denied* 356 U.S. 933 (1958). That case offers an interesting dissertation on that type of liability, but is here of no significance. The same can be said of *In Re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952) and *Dalehite, et al. v. United States*, 346 U.S. 15 (1953). Such decisions do not remotely support appellants' contention that a tanker may not store flammable cargo in her bow tanks. Again, we have an issue which the judge resolved against appellants. The evidence supports his finding.

## ASSIGNMENT VI

Appellants Mitsubishi and Consul General part company with China Union, on the latter's contention that the judge

erred in denying it a limitation of liability under 46 U.S.C. § 183(a).

Our analysis of the record convinces us that the judge was correct in denying China Union limitation and in holding that its own negligence with privity and knowledge contributed to the unseaworthiness of the RELIANCE and the collision as follows:

(a) her steering gear was unseaworthy;

(b) her main engines were unseaworthy;

(c) her captain and chief engineer were not instructed to the effect that all four of her main engines might be coupled astern; and

(d) her telephone communication system between the bridge, engine room and steering engine room was unseaworthy.

We have already dealt, at length, with the judge's findings on the fault of the RELIANCE. Those findings are buttressed by an adequate record. To here repeat those findings would be repetitive in the extreme.

Privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection. Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation. The judge in holding that there was privity and knowledge on the part of China Union and in denying limitation was well within the standards applied in *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963).

Instead of showing that the unseaworthiness of the steering gear of the RELIANCE was without the privity and

knowledge of China Union, its witnesses provided damaging testimony clearly showing the contrary. First of all, the Greek Nationals, by whom the vessel was sold to China Union, would not permit a thorough inspection of the vessel by its representative. On the limited inspection he made, he found many conditions in the engine room which were sub-standard. On his survey of the RELIANCE, he found the door of the steering engine room locked. On arrival of the vessel in New Orleans, the first chief engineer recommended to the company that all auxiliary engineering equipment be opened, inspected and overhauled. Nothing was done on this recommendation. China Union, evidently in an effort to save expenses, did not make such inspections, breakdown or overhaul. The testimony is quite clear that China Union would not permit a thorough inspection of the steering gear while the ship was in Taiwan. Many spare parts, which would be normally carried on a vessel of this type, were missing and, in particular, essential parts in connection with the steering apparatus were missing. This, and other evidence, fully supports the judge's finding[16] of privity and knowledge of a defective steering gear on the part of the owner. Likewise, the judge's findings that the vessel was unseaworthy in the other respects

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[16] "The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost constant difficulties encountered with the main engine, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction." (F. 31, R. 5133-5134.)

with the privity and knowledge of China Union are as fully supported by the evidence. *THE CITY OF CAMDEN*, 292 F. 93 (3d Cir. 1923), cited by China Union, lends neither substance nor support to its contention. On the other hand, the principles stated in that case are in full accord with the findings here under attack. The burden of proof as to the absence of privity or knowledge was on China Union. *Coryell v. Phipps*, 317 U.S. 406, 409; *States S.S. Co. v. United States*, 259 F.2d 458 (9th Cir. 1958), *cert. denied* 358 U.S. 933 (1959), *rehearing denied* 359 U.S. 921 (1959); The Law of Admiralty, Gilmore & Black, 705.[17]

We do not question the soundness of the authorities cited by China Union on this assignment. Yet, the attempt by it to apply the doctrines stated in those cases to our factual background is entirely unsuccessful. Her claim that the RELIANCE'S sheer across the channel was caused by her navigating too close to her starboard bank is foreclosed by the judge's finding that the sheer was caused by unseaworthy steering gear. The district court's findings that the RELIANCE'S main engines were unseaworthy and that her captain and chief engineer were not properly instructed prevent a successful assault along those lines. China Union states that there is no evidence whatsoever to support the judge's finding that the RELIANCE'S telephone communication system between the bridge, the engine room and the steering room was unseaworthy. This statement is clearly wrong. The record contains uncontradicted evidence that when the emergency arose on the RE-

[17] "It seems reasonable that the ship owner, who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge."

LIANCE, and communications had to be made between the bridge and the engine room, and between the bridge and the steering engine room, this was accomplished by sending messengers running about the ship, rather than by attempting to use the sound powered phones. Certainly, this creates a strong presumption that the phones were out of order. This evidence and the inferences to be drawn therefrom, clearly support the judge's finding that this condition contributed to the collision and that there was no direct means of phone communication between these important stations on the vessel. Obviously, a prompt telephone call to the steering engine room for full speed astern, might well have averted the collision.

There is no substance to this assignment.

## ASSIGNMENT VII

On this assignment, appellant China Union disclaims liability on the theory that the fire originated from the other vessel and that it, as a carrier, was protected under its Bill of Lading and the Fire Statute.

The provisions of CGSA[18] required China Union to exercise diligence: (a) to make the ship seaworthy; (b) to properly man, equip and supply the ship. Subsection (8) of the Act nullifies any clause, covenant or agreement in a contract of carriage which would relieve the carrier or the ship from liability for loss or damage, to or in connection with the goods, arising from fault or failure in duty in the obligations imposed by the Act. 46 U.S.C. § 1303 (8). Section 1304 (1) places on the carrier the burden of proving due diligence when the loss or damage results from unseaworthiness. These provisions and the

[18] 46 U.S.C. §§ 1300, et seq.

finding by the judge of unseaworthiness on the part of the RELIANCE, places the petitioner beyond the protective provisions of the Act. The particular fire was "caused by the actual fault with privity of the carrier." CGSA offers no escape to China Union. Even if the issues were doubtful they should be resolved in favor of the cargo. *THE SOUTHWARK*, 191 U.S. 1 (1903); *Artemus Maritime Co., Inc. v. Southwestern Sugar & Molasses Co., Inc.*, 189 F.2d 488 (4th Cir. 1951).

## CLAIM AGAINST CYANAMID

China Union and the Consul General complain of the action of the judge in dismissing the libel against Cyanamid. Aside from the subject discussed under Assignment V, the appellants pose two additional assignments against Cyanamid: (1) the procedure on the dismissal, and (2) that Cyanamid had actual knowledge, or by the exercise of reasonable diligence should have known, of the dangerous, poisonous and lethal characteristics of acrylonitrile, of which the Coast Guard and BEREAN had no knowledge.

At the outset, we must stress the grave doubts we entertain on whether China Union has standing to press these assignments. The damage to RELIANCE and its cargo was caused by fire, not by the poisonous or toxic qualities of the chemical. Since gasoline and other such products are as flammable and explosive as acrylonitrile and since such other products may be legally carried in forward tanks, next to the skin of the ship, it would seem that no causal relationship exists between the toxicity of that chemical and the fire damage to China Union's property, or its cargo.

(1) The first point is one of procedure, rather than substance. The record shows that during the course of the trial, the judge asked all parties if all evidence, except as to damages, had been presented against Cyanamid. After counsel for the respective parties indicated that they had no additional evidence to offer against that company, its proctor moved for a dismissal.[19] Forty pages of the record are devoted to a transcription of the arguments of the proctors on this motion. No claim was made that there was additional evidence to offer on the subject. For that matter, the precise issues raised on this appeal were fully argued to the judge. At the conclusion of the arguments, the motion was taken under advisement and was not decided until the following morning, at which time the judge found in favor of Cyanamid.[20] Obviously, the judge made findings on the issues then before him. In the formal findings, the judge made it clear that he was passing on the issue of the liability.[21] We must view this record as the

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[19] "Mr. Waesche: If Your Honor please, in that event we would like to move to dismiss the action against American Cyanamid, on the grounds that the libelants have failed to establish a cause of action against them." (R. 3413.)

[20] "As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way the BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R. 3454.)

[21] ". . . **At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised**

findings of the judge on the issues then presented. Those findings, unless clearly erroneous, even though informal, are binding on us. *Myles v. Quinn Menhadden Fisheries*, 302 F.2d 146 (5th Cir. 1962). The fact that the findings were made on a motion for dismissal, or for a *directed verdict*, as argued by one of appellants, is of no significance.

(2) On the motion for dismissal, the proctor for Cyanamid argued that the evidence almost conclusively demonstrated that the Chinese crew men died or were injured as a result of the raging fire, on the water and on the RELIANCE. Proctor for the dead and injured seamen, on the other hand, argued that the men died from, or were injured by, the toxic and poisonous effects of the chemical. Cyanamid pointed to the evidence of a young lieutenant of the Coast Guard who testified that he and his men worked right at the hatch where the particular cargo was loaded, and from there fought the fire with no ill effects. A number of the members of the crew of the BEREAN testified that they went forward and fought the fire with no ill effects. The master of the tug boat said that he was in there fighting the fire. Members of the crew of RELIANCE were on the foredeck fighting the fire. Most of the photographs of decedents, with one exception, disclose faces and bodies that were "badly charred." The one major exception was the picture of a Chinese second mate, who evidently died in the cabin deck washroom. He was not burned, nor was there anything else observed which pointed to the cause of his death. The photograph in evi-

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**by all counsel that the claim against American Cyanamid rested solely on the evidence produced by petitioner.** The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against that respondent." (Emphasis supplied.) (R. 5118.)

dence, and the testimony shows, that the pilot Duncan was burned beyond recognition.

In support of his position, proctor for the injured and decedents, called attention to the unburned body of the second mate that was found in the washroom, the body of the oiler-wiper who was found above the main deck and who was not "burned too seriously," and to the testimony of the funeral director that he examined five bodies which were recovered in Galveston Bay, over one week after the casualty. He testified that he did not find burns "to any noticeable degree." These bodies were puffed and swollen to such an extent that examination was difficult. The undertaker thought that the death of each of these men was caused by drowning.

Even the death certificates do not support the theory that death could have been caused by the toxic or poisonous effects of the chemical under observation. Five of the certificates gave the cause of death as "drowning, due to jumping overboard;" five of the certificates gave the cause of death as "suffocation, 2nd & 3rd degree burns," and one certificate gave the cause of death as "septisemia, due to major thermal body burns." Even as to the decedents whose deaths were attributed to drowning, the funeral director conceded that there were burns on the bodies.

In any event, both in the testimony and on the argument, the theory of the Consul General was fully presented to, and explored by, the able trial judge. After analyzing all of the evidence, he found that the deaths and personal injuries were caused by fire.[22] While this specific finding

[22] "As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-

was not made at the time of ruling on Cyanamid's motion for dismissal, no additional evidence was produced on the subject. For that matter, the final dismissal as to Cyanamid is a part of the main interlocutory decree, from which this appeal is prosecuted. This dismissal, of course, was entered after the entry of the findings and conclusions. Therefore, Cyanamid is entitled to the benefit of each finding on which the decree is based.

If, in fact, it could be said that the judge failed to make a finding on the issue of the cause of death or injuries, nevertheless, the burden of proof on that issue was on the Consul General. Consequently, all facts not embraced in the specific findings should be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens*, 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant*, 143 F.2d 170 (7th Cir. 1944), *cert. denied* 323 U.S. 734. Appellant had a right to seek a specific finding if he so desired.

Any other finding by the judge, on the record before him, would be based on pure speculation and guess work. This is conceded by Dr. Brieger, the principal witness for China Union and its dead and injured crew members, who testified that an autopsy would be required before even an expert could express an opinion on whether any one of these men died from exposure to acrylonitrile.[23] With

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Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130.)

[23] "An autopsy would show whether the man, in addition to the effect of the fire, has absorbed large quantities of acrylonitrile, which, as I have told, will be converted into cyanide, a very easy

this opinion in the record, a trial judge could arrive at no conclusion other than that the Consul General had failed in his burden of showing that death or injury was caused from the toxic effects of the acrylonitrile.

Completely disregarding the effect of the controlling finding that fire was the cause of the deaths and personal injuries, both China Union and the Consul General again point to testimony indicating a practice in the chemical industry to construct cofferdam space around tanks in which dangerous chemicals are to be transported and that one of the purposes of such construction was to prevent the escape of such chemicals in the event of a collision. Other testimony indicates that it was a common practice in the industry to carry dangerous chemicals away from the skin of the ship. Doctor Brieger testified that sufficient bodily contact with acrylonitrile would, in his opinion, cause death by ingestion or by inhalation of its fumes. He, likewise, opined that acrylonitrile was much more poisonous than a five percent dilution of hydrocyanic acid which, by Coast Guard Regulations, was classified, for transportation purposes, as a Class B poison. He thought that the statement in Cyanamid's literature that acrylonitrile produces symptoms "similar to those produced by hydrogent cyanide" was incorrect. His thought was that the symptoms were precisely the same, but this is a mere play in words, and not of substance. He also believed that

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affair; it can be shown with a spectrophotometer and otherwise; and if such an autopsy is made, one can state whether this individual had absorbed such quantities of acrylonitrile that they in themselves would have killed this man. **But this can only be done —such a statement can only be made if a proper autopsy has been made, or if the blood is bright red; that's a much simpler method. It would indicate that the man has indeed absorbed very large quantities or large quantities of acrylonitrile, with the consecutive development of cyanide."** (Emphasis supplied.) (R. 2129.)

if rat tests had been made by the Coast Guard with the chemical, it probably would have been classified in a Class B category as toxic or poisonous in nature. The judge was not bound to accept and apply these opinions. He was only bound to give to them such weight as he thought they deserved and he was at liberty to entirely reject them if he felt that the reasons given in support thereof were unsound. This rule is applicable to a trial judge, as well as a trial jury. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Also, the judge had the opportunity to see and hear the witness and pass on his credibility.

Beyond that, the printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error. Of significance, though not controlling, is the fact that the casualty occurred in November, 1961. There was an immediate Coast Guard investigation. The classification of acrylonitrile has been reviewed by the Coast Guard on at least three occasions[24] since the casualty and remains in the same classification. The legal principles applied in *Whorton v. T. A. Loving & Co.*, 344 F.2d 739 (4th Cir. 1965), are sound, but the factual background there discussed is so far removed from ours that such principles cannot be here applied. For the purpose of this opinion, we have assumed that liability would attach to

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[24] (1) 46 C.F.R. § 146.21-100, p. 172, § 146.25-200, p. 495-694; (2) 46 C.F.R. § 146.10-100, p. 20, § 146.25-200, p. 220-256; (3) Federal Register, December 24, 1964, Vol. 29, No. 248, pp. 18163-18168.

Cyanamid if the evidence disclosed a breach of duty, tortious or contractual.

Aside from everything else, it would appear that the proximate cause of death of and injuries to the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed. The remarkably clear pictures in evidence demonstrate that the RELIANCE ruptured the skin of the BEREAN and advanced into the hull to a depth of approximately 14 feet. Obviously, the inside skin of a cofferdam would have been ruptured and such a dam would not have prevented the escape of the chemical. Under the weight of this assault, a cofferdam would have provided no more protection that would a sheet of tissue paper.

## CLAIM OF UNITED STATES

China Union alone challenges the claim of the United States. The claim consists of three separate items:

(1) expense of removing and re-anchoring the RELIANCE, $8,582.00, and

(2) expense of shipkeepers and similar expenses to preserve the property, $6,031.38, and

(3) expense of stand-by tug to prevent the vessel from moving and re-blocking the channel, $21,188.00.

That the RELIANCE, as a result of the casualty, became a flaming derelict which imperiled the very existence of

other watercraft and obstructed and prevented the navigation of the channel, is beyond argument. The owner and underwriters were unable to control the fire. Acting under the emergency provisions of 33 U.S.C. § 415, the United States District Engineer, after a special investigation, made a determination that the RELIANCE was a special danger to navigation and, after notice to owner, directed that the vessel be towed from the channel and anchored in Bolivar Roads, adjacent to the channel.

After removal of the vessel, the United States filed a libel, asking for the sale of the vessel,[25] to pay the cost of removal and incidental expenses. This proceeding was enjoined, on November 29, 1961, on China Union's petition for a limitation of liability. After granting the injunction, the judge required China Union to pay into court the cost of removal of the vessel in the sum of $8,582.00. Other proceedings, and allowances, are outlined in detail in *American Cyanamid Co. v. China Union Lines,* 306 F.2d 135 (5th Cir. 1962), in which proceeding the circuit court refused jurisdiction, but suggested that the district judge might make findings on the issues presented.

On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds $8,582.00, the expenses of removal. While the Government could not proceed *in personam,* against China Union, *United States v. Bethlehem Steel Corp.,* 319 F.2d 512 (9th Cir. 1963), cert. denied 375 U.S. 966 (1964) and *United States v. Zubik,* 295 F.2d 53 (3d Cir. 1961), we must remember that it was China Union which was seeking the injunction and a limitation of its liability. It was to its

[25] Sold as scrap for $109,100.00.

advantage, and the advantage of its underwriters, to free the RELIANCE of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right.[26] The order of the court did not amount to a judgment *in personam* against the petitioner, but merely required China Union to do what it should have done in the first instance.

On December 3, 1962, after receipt of the mandate of the Court of Appeals, the judge held a supplemental hearing, at which time testimony was taken and exhibits introduced in connection with the nature and reasonableness of the Government's and other claims. Eighteen witnesses testified at this hearing and there is solid evidence to support the finding in favor of the Government. The fact that the judge's finding on the subject, is included under his conclusions of law,[27] is of no significance. *Compania Transccontinental de Petroleo, S.A. v. Mexican Gulf Oil Co., et al.*, 292 Fed. 846 (2d Cir. 1923); *Arkansas Amusement Corp. v. Kempner*, 57 F.2d 466 (8th Cir.

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[26] "Had this Court not intervened . . . the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A." (Order, January 28, 1963.)

[27] "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States."

1932). Even in the absence of a finding of fact, this being a trial *de novo,* we would be compelled to say that the record fully supports the pertinent provisions of the interlocutory decree. True enough, specific amounts are not mentioned in this finding. However, there can be no misunderstanding as to the amounts, in that the division of the Government's claim, both in the exhibits and the testimony, was uniform and precise. They are the figures which are set forth, with exactness, in the interlocutory decree.

It is our view that item (3) of the Government's claim is also covered by the provisions of 33 U.S.C. § 415, and that the lien against the RELIANCE for such item was also first in time and prior in right. The statute contemplates that the Government hold said vessel for a period of thirty days, after notice to the owner, and therafter until sale. It is logical to assume that the Congress intended the Government to take proper care of the vessel during possession. The "expense of removing," in our opinion, should not be limited to the precise cost of removing the vessel from the place of the casualty to a place of safety, but should also cover any and all reasonable expense incidental to the removal and enforcement process, such as the expense of safeguarding. This expense is contemplated by the statute. Petitioner's arguments that the tug hire of $21,188.00 was not a legitimate expense, is illusory in the extreme. The record discloses many considerations which weighed in favor of having the tug stand by, rather than using two anchors. The District Engineer, after consultation with Coast Guard officers, decided to use only one anchor and have the tug stand by, so as to be assured of its immediate availability in case the anchor did not hold. Those making the decision were of the opinion that (1)

two anchors might foul the vessel, (2) the anchor windlass and the deck supporting it had been subjected to severe fire, (3) the "upper shots" of the anchor chain had been subjected to severe heat, (4) the Galveston area was subject to severe changes in weather conditions, (5) the tide was exceptionally swift where the vessel was anchored, and (6) the vessel, even with dual anchors, might well slip back into the channel. True enough, the court eventually found that the tug was not necessary to keep the RELIANCE at its anchorage, and this is the point on which China Union principally relies. Here, the mischievous aura of validity which lurks behind the veil of hindsight is again presented. The original action of the District Engineer in ordering the tug to stand by, when viewed in light of his obligation to protect the traffic in the channel without unduly jeopardizing the vessel and its cargo, is quite understandable. The judge's action, in subsequently ordering the tug dismissed, was taken after more than two weeks of actual experience in holding the vessel at anchor. It does not imply disapproval of its previous use; indeed, doubtless because of his own wise reluctance to be governed by hindsight, the judge expressly refused to pass on that question at that time. The record reveals no subsequent developments weighing against his ultimate approval of the charge.

On November 27, 1961, the judge dismissed the tug from standing by the RELIANCE and, on that day, placed shipkeepers aboard pending the further order of the court. At the same time, custody of the vessel was taken by the United States Marshal and the court was thereafter in possession. Earlier, on November 24th, the District Engineer, acting on order from the United States Attorney's office, caused shipkeepers to be placed aboard

and the cost of employing those shipkeepers, round the clock, both before and after the court order is, in major part, the basis for the Government's claim of $6,031.38. China Union charges that the Government was no longer in possession of the vessel and is not entitled to this allowance. This claim is without validity, whether we view the service performed as under the statute, or as an allowance by the court to the Government for expense incurred in connection with protecting the vessel, after the seizure by the Marshal. Our only area of doubt is whether any allowance should be made for the three day period November 24-27, when the tug was also standing by. It does not appear that this "over-lapping" was called to the attention of the judge and he may want to take another look at this feature in the other proceedings which must be hereafter conducted by him. We believe that the employment of the shipkeepers on and after November 27th, should be treated as an "expense of justice" and entitled to perferential treatment. *New York Dock Co. v. S.S. POZNAN*, 274 U.S. 117 (1927); *THE ST. PAUL*, 271 Fed. 265 (2d Cir. 1921). Since these expenses were necessary they should be allowed. *Yokahama Bank v. Wong*, 113 F.2d 329 (9th Cir. 1940); *THE TRANSFER NO. 7*, 176 F.2d 950 (2d Cir. 1949).

## OTHER CLAIMS

China Union claims a right to payment of its own salvage expenses out of the limitation fund, on the theory that the value to be surrendered in a limitation proceeding is the value of the owner's interest in the vessel immediately after the casualty. Here, we call attention to the fact that the judge reserved ruling on this particular

issue and at one time indicated that he favored the position of China Union.[28] One of the provisions of the interlocutory decree makes it crystal clear that the judge was not passing on the issues between claimants to the limitation fund.[29] The validity of petitioner's salvage claims, including its claim for the refund of said $8,582.00, and other sums previously paid into the registry, are subject to the "further orders" of the District Court.[30]

The assessment of interest against China Union on the originally unlisted prepaid freights, was a matter within the sound discretion of the judge. Petitioner's claim that it proceeded in the utmost good faith, in withholding such freights, was a subject to be weighed and considered by the judge in charge of the proceeding. Obviously, he felt that the petitioner's action, in consistently attempting to set off its claimed salvage charges against the amount of the prepaid freight and interest, was arbitrary and unnecessary. The record supports this assessment of interest. An allowance of interest is recognized in *LA BOURGOGNE,* 139 Fed. 433 (2d Cir. 1905); *LA BOURGOGNE* (*Deslions v. LaCompagnie Generale Transatlantique*), 210 U.S. 95 (1908). Even if viewed as a penalty, the exaction of the interest under the facts in this case would be justified.

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[28] Order, January 28, 1963.

[29] "(3) That after payment of the Trustee's expenses, as hereinabove provided, the claim of the United States of America shall be paid as hereinafter provided, **following which any funds remaining in the registry of the Court shall remain pending further orders of this Court.**" (R. 5148.) (Emphasis supplied.)

[30] China Union, whose fault was the sole cause of the casualty, may not be entitled to make a claim for salvage, **THE CLARITA and THE CLARA,** 90 U.S. 1, 18 (1874).

## CONCLUSION

On appeal in an admiralty case, the appellate court is bound by the findings of the trial court and they will not be set aside unless the party seeking to have them overturned demonstrates that they are not supported by credible evidence, or were induced by an erroneous view of the law. *Trinidad Corp. v. Indian Towing Co.*, 293 F.2d 107 (5th Cir. 1961), *cert. denied* 369 U.S. 861; *Ohio Barge Line, Inc. v. Oil Transport Co.*, 280 F.2d 448 (5th Cir. 1960).

On the entire record, to considerable of which we have made specific reference, we hold that the trial judge's findings were amply supported by substantial evidence, and not clearly erroneous. We have a firm conviction that each of the parties received a fair and an impartial trial. We find nothing in the brief of Lucy Duncan to justify striking the same from the file. The motion is denied. The interlocutory decree is affirmed.

BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in all of the very excellent opinion prepared for the Court by Judge Kilkenny except as to some portions in the section entitled "Assignment V" as to which I have some reservations and that part entitled "Claim Against Cyanamid" which I believe to be erroneous. As to the latter I dissent. My difference would not change the result as between BEREAN and RELIANCE, between RELIANCE'S Cargo and RELIANCE, between the injured/decedents and RELIANCE and her owners, or the denial of relief as to injured/decedents against BEREAN. It would afford RELIANCE and the injured/deceased victims the right to show that damages and injuries were

caused or aggravated by Cyanamid's neglect of its duties. To this extent and for this purpose, I believe the case should be reversed and remanded.

As to "Assignment V," I accept the proposition that a shipowner is entitled to rely on the classification of the material and the stowage requirements prescribed by the regulatory agency, here the Coast Guard. There may, however, come a time when a carrier acquires so much knowledge about the peculiar characteristics of a particular cargo, which are not generally known, that it can no longer rely solely on the insulation afforded by reading and applying Coast Guard regulations which it knows in fact are either wrong or incomplete. The aim of the regulations, the aim of the law, is to promote safety, especially to the innocent third parties—crewmembers, longshoremen, persons on other vessels, members of the public, and others—who are likely to be exposed to the hazards of the product in its normal course of distribution, transportation, and handling. That aim is hardly achieved by an absolute which declares that a shipowner may ignore hazards not disclosed by the Regulations, but of which it knows and knows how to minimize by prudence. This is a long way from making every shipowner his own chemist, physicist, physical chemist, or the like in this day of scientific marvels and new esoteric products.

But Cyanamid is in no such favored position. It is the manufacturer and supplier of a chemical that it knows can and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It cannot rely on—and the proof does not even begin remotely to suggest that it ever did, or would, rely on—the Coast Guard. Cyanamid knows that if it—a huge industrial enterprise which proudly

claims a pre-eminence in this chemical field—relied on the Coast Guard with its limited laboratory facilities for its research and development, it would go bankrupt. The Coast Guard might come to it, but it would never, simply never, go to the Coast Guard to ascertain what the characteristics and hazards of its own product are.

So while the law affords to BEREAN the right to accept a faulty Coast Guard classification, Cyanamid can claim no such privilege. Its own published pamphlet entitled "Handling-Storage-Analysis of Acrylonitrile," introduced as an exhibit and to which the Court's opinion refers, makes it clear that it was, as Dr. Brieger testified, no less toxic than a Class B poison since it was more toxic than the test standard 5% dilution of hydrocyanic acid. Dr. Brieger had preeminent qualifications which Cyanamid never challenged—indeed could not challenge.[31] If, as the Court suggests, his testimony was guarded, occasionally hesitant, it was, as the quoted reference to autopsies (see note 23) reveals, just another clear proof of his scientific competence. Time and time again, he made plain, based upon a lifetime study and industrial experience with this very compound, that for seamen to be afloat in water having a film of Acrylonitrile on the surface[32] would mean almost certain death.[33] And that is what Cyanamid's own

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[31] Dr. Brieger had made tests and reports on Acrylonitrile which were submitted to Cyanamid.

[32] In the collision, No. 1 port wing tank was ruptured. All of the 226 tons of Acrylonitrile spilled out into the channel.

[33] Ironically the record reveals that about a year after this collision, the Master of BEREAN was killed by Acrylonitrile fumes resulting from a very small leak in the pump room. No one, certainly not Cyanamid, suggests that this post-collision event was an untoward surprise to those knowledgeable about Acrylonitrile.

pamphlet reflected in vivid terms.[34]

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[34] As to handling the chemical, Cyanamid explains:

"The precautions set forth in this bulletin are the results of the experience gained in handling and storing Acrylonitrile during this period. It should be emphasized at the outset, that because of the toxic and flammable nature of Acrylonitrile, handling operations should be performed in areas which are properly ventilated and free from sources of ignition."

As to cleaning tanks in which Acrylonitrile has been stored, Cyanamid warns:

"Protective equipment should be made available to those entering [storage] tanks. This equipment should include coveralls, eye goggles, and gas masks. * * * The person working in the tank should be provided with a body harness with life line attached. Station a man on the outside end of the life line to do nothing but watch the worker within."

And the type of gas mask required differs with the concentration of the chemical's vapors:

"Use this type of canister (organic vapor) **only** in locations where the Acrylonitrile vapor content is less than 2% and the oxygen concentration is above 16%. Otherwise a mask with self contained oxygen or air supply **must** be employed." [Emphasis in original]

Cyanamid is the last to minimize the effects of the chemical on the human body:

"Acrylonitrile is toxic by inhalation, by absorption through the skin, and by oral ingestion.

"* * *

"Poisoning by Acrylonitrile produces symptoms which are similar to those produced by hydrogen cyanide. Excessive vapor inhalation causes weakness, headache, sneezing, abdominal pain, and vomiting. Absorption of large amounts of the liquid through the skin produces similar symptoms * * *."

And in describing the proper methods of waste disposal, the manufacturer warns of the danger to fish:

"Acrylonitrile stream effluents should be treated to such an extent that they pose no danger to downstream public water supplies or to aquatic life. * * * Although it has been demonstrated that fresh-water fish can tolerate an Acrylonitrile level of 10 p.p.m., the actual tolerable limit will depend on local conditions and use of streams."

And if that "aquatic life" happens to be seamen afloat, who will both absorb and breath vapors, "the currently accepted threshold limit for * * * an eight-hour exposure is 20 parts of vapor per

The question is not whether BEREAN was at fault in loading Acrylonitrile in skin tanks unprotected by cofferdams. The question is whether Cyanamid knowing what it does, could knowingly load BEREAN at Cyanamid's terminal knowing also that the cargo was going into skin tanks. In this respect Cyanamid had duties that transcended those it owed to Andersen or BEREAN and which, the Court supposes, it perhaps satisfied by showing the Master the blue pamphlet. It owed a duty literally to the world—at least that world within the reach and protection of American jurisprudence, land-based, salt water and amphibious. It had to have in mind port workers at the place of loading, crew members on the carrying vessel, crew members on accessorial tugs, owners and crew members of vessels with which the carrying vessel might come in contact by collision or otherwise, port officials, customs inspectors, immigration officers, maritime service personnel, and members of the public. The duties owed to this limitless group of protectees require as a minimum that it not

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million parts of air," which makes it more toxic than carbon tetra chloride (25 p.p.m.) but only slightly less toxic than hydrogen cyanide (10 p.p.m.). Nevertheless, the chemical is toxic enough so that "the regimen of treatment [by a physician] recommended for Acrylonitrile poisoning is that for cyanide poisoning."

In several places and ways the pamphlet equates Acrylonitrile with Hydrogen Cyanide (Hydrocyanic Acid). This is a Class A Poison, §146.25-5, defined as "poisonous gases or liquids of such nature that a very small amount of gas, or liquid, mixed with air is dangerous to life." As such it is listed with only 13 other poisons, three of which are military poisonous gases. And footnote 1 to Hydrocyanic Acid permits dilute solutions not exceeding 5% strength to be classed as Class B poisons. Class B covers "Poisonous liquids or solids * * * other than Class A, C or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation." §146.25-10. Rat and rabbit ingestion, absorption and inhalation test standards are thereafter prescribed. There is no evidence to refute Dr. Brieger's testimony that Acrylonitrile would fail these tests.

knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid, the manufacturer-supplier-shipper, has the liability of an insurer, but it certainly has the far-reaching awesome liabilities now associated with products liability. *Putman v. Erie City Mfg. Co.*, 5 Cir., 1964, 338 F.2d 911, Restatement, Torts § 388. When the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability. Indeed, this teaching of Texas City was not lost to the industrial or judicial world because the Government as the manufacturer of FGAN escaped liability from the peculiar governmental "discretionary function" exemption, *Dalehite v. United States*, 1953, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, . . . AMC . . ., or the stringent limitation of the scope of the FTCA to exclude "novel and unprecedented" cases, a reading which was shortly to be repudiated. *Rayonier v. United States*, 1957, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354.

But the trial Judge never really faced up to this issue. Nor does this Court. Rather, each equates Cyanamid's obligations with those the carrying vessel BEREAN owed to others. As to the BEREAN, the Coast Guard regulations, so long as BEREAN did not know they were faulty, were an adequate insulation. But in relation to members of the public and others, Cyanamid could not fall back on the Coast Guard. The problem was really not whether the Coast Guard classification was in error, as Dr. Brieger tried to demonstrate. Rather, it was what Cyanamid actually knew and ought to have known about its own product and knowing that, what in prudence considering these ex-

tremely high hazards could and ought to be done to minimize,[35] if not eliminate, the devastating consequences of a foreseeable casualty.

This was a basic error in approach by the District Judge. And our efforts to overcome the deficiency by questioning the standing of China Union to assert the claim and to hold as a matter of law that there could be no proof of *causation* as to the claims of the injured/deceased will not suffice. We must recall that this case, as are all extensive maritime catastrophies, was being tried in two stages—liability and damages. This is the first time, to my knowledge, for example, in which death certificates, issued generally in Texas by people whose only competence is the lowest office in the judicial hierarchy—prove the cause of death. I agree the issue has not been proved. No more so was the damages sustained by BEREAN or its cargo. That is to come later. As to China Union's standing, at the liability phase only, who is to say that had the fumes from this lethal cargo not have been freed by rupture of the hull forming the tank sides, the action on RELIANCE might not have been different?

On this record, the Judge should have held that as against Cyanamid a prima facie case had been made out. Cyanamid should have been put to its proof to refute, if it could, the hazardous characteristics, and on what prudence would require of the manufacturer-supplier-shipper of a product of such deadly potential.[36] The Judge would then have de-

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[35] BEREAN had main tanks 1 through 8 divided by longitudinal bulkheads affording a series of 16 inboard tanks fully separated from the ship's hull by wing tanks on each, port and starboard, side.

[36] Indeed at this point the Coast Guard regulations might turn on Cyanamid to prescribe an absolute standard. Cf. Marshall v.

cided whether Cyanamid had the usual land-based products liability of a chemical manufacturer. If he declared in the affirmative, proof of damages, if any—and I do not minimize the if any—would be opened for a second stage on damages.

The admiralty has led, not followed. But here salt water dilutes the responsibility now so plainly resting on the manufacturer-supplier-shipper of a commercially useful, indeed valuable, chemical compound which carries death with its utility.

I would therefore reverse for further hearing as appropriate on the claims of RELIANCE and her owners, and the injured/decedents against Cyanamid.

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Isthmian Lines, Inc., 5 Cir., 1964, 344 F.2d 131, ____AMC____. If, as Dr. Brieger so stoutly maintained, the rat tests prescribed by §146.25-10(1)(2) (See note 34, supra)* would bring Acrylonitrile within Class B poisons, then it is undisputed that for a combustible liquid having lethal characteristics and defined as a Class B or Class C poison, such cargo must be carried in tanks which are independent of the ship's hull, separated by cofferdams, etc. 46 C.F.R. §39.01-1, .05-1. The significance of such tests would not be to establish that classifying Acrylonitrile as inflammable by the Coast Guard was erroneous as such. Rather, since a manufacturer knows what accepted tests would reveal, the significance would be to forbid the manufacturer as shipper to tender it for shipment without disclosing all these characteristics and to knowingly participate in a loading or shipment which, with such knowledge, it knows to be dangerous. Cf. 46 USCA §170(10).

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
October Term, 1964

NO. 21367

D. C. Docket Nos. 2018 and 2006-Admiralty

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL, LAN JING-CHAU, ET AL, ARMEMENT DEPPE, S.A., ET AL.,
*Appellants,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Appellees.*

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

### JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the interlocutory *decree* of the said District Court in this cause be, and the same is hereby, affirmed. The motion to strike the brief of Lucy Duncan is denied;

It is further ordered and adjudged that the appellant, China Union Lines, Ltd., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

BROWN, Circuit Judge, concurs in part and dissents in part.

Issued as Mandate: July 27, 1966

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*Of the District Court of Oregon, sitting by designation.

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 21,367

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S.A., ET AL.,
*Appellants,*

vs.

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Appellees.*

Appeal from an Interlocutory Decree of the United States District Court for the Southern District of Texas.

(OCTOBER 7, 1966)

ON PETITIONS FOR REHEARING

Before BROWN and GEWIN, Circuit Judges, and KILKENNY*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above styled and numbered cause be, and the same are hereby, denied.

*Of the District of Oregon, sitting by designation.

## APPENDIX D

## DECISION OF DISTRICT COURT

(Caption Omitted)

(Filed July 17, 1963)

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### PRELIMINARY STATEMENT

At approximately 11:15 p.m. on the night of November 7, 1961, the Chinese Motor Vessel UNION RELIANCE and the Norwegian Motor Tanker BEREAN were in collision in that portion of the Houston Ship Channel which crosses Galveston Bay. As a result, twelve lives were lost and certain personal injuries were sustained aboard the UNION RELIANCE. Both vessels were damaged and damage was done to the cargo aboard each vessel.

Both vessels caught fire, though the fire aboard the BEREAN was extinguished within a matter of a few hours. The UNION RELIANCE remained ablaze and at anchor, blocking the Houston Ship Channel at a point close to Buoy No. 73. On November 10, 1961, while still ablaze to such extent that no one could board her, the UNION RELIANCE was towed by the United States Corps of Engineers to Galveston Harbor, where she was anchored.

### THE LITIGATION

Shortly thereafter, the United States of America filed her libel *in rem* against the UNION RELIANCE seeking the immediate sale of the vessel and the recovery of the expenses incurred by the United States in removing her from the Houston Ship Channel and for safeguarding her while at anchorage. Shortly thereafter, China Union Lines,

Ltd., owner of the UNION RELIANCE, filed its petition for exoneration or limitation of liability; and on November 29, 1961, obtained the customary order from this Court prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding.

In connection with its petition to limit, China Union Lines elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. Ben G. Sewell, Esq. was appointed Trustee and entered upon his duties. Upon the recommendation of proctor for petitioner, and a need therefor appearing, the Court appointed J. R. Bencal, a competent and experienced marine surveyor, (and who had been employed in that capacity to represent petitioner's interest from the inception) as salvage master, and authorized such salvage master to undertake the steps necessary to extinguish the fire in the vessel's holds and to bring her into port for the purpose of discharging her remaining cargo preparatory to sale.

Meanwhile, in other proceedings in this Court, China Union Lines had filed its libel against the BEREAN. Her owner, A. O. Andersen & Co., Inc., appeared, claimed the vessel, answered and cross-libeled against China Union Lines. The owners and underwriters of the lost and damaged cargo aboard UNION RELIANCE filed their libel against BEREAN and her owners. Similarly, American Cyanamid Company, the owner of the only cargo lost aboard BEREAN, filed its libel against UNION RELIANCE.

The officers and members of the crew of UNION RELIANCE who were killed or injured all were Nationals of the Republic of China. The Consul of that government, residing in Houston, sought to recover for these injuries and deaths, against both vessels. Also killed as a result of

the collision was the Houston Ship Channel Pilot (Captain Duncan) aboard UNION RELIANCE, whose widow, Lucy Duncan, has made claim against UNION RELIANCE and her owners.

Thereafter came several claims by owners of ships which allegedly were delayed by the blocking of the Houston Ship Channel for a period of some two days.

Additionally, China Union Lines, and the owners and underwriters of the cargo aboard UNION RELIANCE and various other parties filed separate libels directly against American Cyanamid, as owner of the cargo of BEREAN. It was the theory of these libels that the acrylonitrile carried by BEREAN, and which had spread, caught fire, and ignited the two vessels, was of such dangerous nature and propensity as to render the owner-shipper liable to the injured parties.

## PRE-TRIAL DEVELOPMENTS

Pursuant to the order of the Court appointing him salvage master, J. R. Bencal, working in close connection with proctor for petitioner, secured equipment and services with which he was able to extinguish the fire aboard UNION RELIANCE. Thereafter she was brought into the port of Galveston, her cargo was discharged, and she was made ready for sale. Under order of Court, the remains of the vessel were sold by the Trustee for a gross price of approximately $109,000.00.

Thereafter application was made to the Court and to the Trustee for the immediate payment from these proceeds of sale for services and materials furnished at the request of the salvage master. Petitioner sought to be reim-

bursed for sums expended in this fashion. The United States sought to recover its expenses in moving and safeguarding the vessel, as salvage claims. The firemen, and those furnishing the equipment used in combating the fire, made similar claims. After one or more hearings with respect thereto, this Court entered an order on March 12, 1962, by which provision was made for their disposition. That order was made the subject of an interlocutory appeal which originally was allowed by the Court of Appeals for the Fifth Circuit. After hearing, however, the order allowing the appeal was vacated and the cause remanded to this Court for further proceedings (306 F.2d 135). Thereafter, extensive hearings again were held by this Court resulting in the order of January 28, 1963, directing the immediate payment of certain salvage claims, and deferring the payment of the remainder of such claims pending a decision on the issue of liability.

This maze of litigation was consolidated, and the pleadings amended so as properly to tender to the Court all issues of liability.

## THE TRIAL

Trial on the issue of liability alone commenced March 11, 1963, and proceeded until April 12, 1963. The Court heard witnesses from among the officers and crews of each vessel, and others, and received voluminous documentory evidence. At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence

produced by petitioner. The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against that respondent.

## FINDINGS OF FACT

*The Vessels and Their Owners*

1. The petitioner in limitation, China Union Lines, Ltd., is a private corporation organized and doing business under the laws of the Republic of China, having its principal office in Taipei, Taiwan.

2. The UNION RELIANCE was a steel motor ship, 496 feet in length, designed for the carriage of dry cargo, built in the United States in 1940. Having served several owners under several flags, she was purchased from Greek nationals by China Union Lines, Ltd., in April, 1961.

3. UNION RELIANCE was one of only four vessels constructed in the same yard and at about the same time, with main engines of this type. She was fitted with four diesels, controlled in pairs, and equipped with electromagnetic couplings, through which the power of either or both pairs, operating either ahead or astern, could be transmitted to the propeller shaft. These engines were designed to give 240 engine revolutions per minute, and, with a 3-1 gear ratio, to give 80 revolutions of the shaft per minute. As will be noted more in detail hereafter, however, by reason of age, wear and poor maintenance, at all times material to this proceeding, the engines were not capable of approaching this efficiency.

To change the direction in which power is imparted to the propeller shaft (that is, if the propeller is driving the vessel forward, and if it is desired to impart astern power), it was necessary to stop the engines by cutting off the fuel supply, to change the cam setting, and to restart the engines.

With all four engines operating at or near design efficiency, one pair of engines normally produced sufficient power, and revolutions of the shaft, for routine harbor maneuvering. Hence the design permitted—and contemplated—one pair of engines to be kept running ahead, and the other pair kept running astern at all times while the vessel was in pilot waters. Thus the engineer could reverse the direction of the screw by a simple maneuver of uncoupling one set of engines, and coupling on the others. When desirable, all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was not a difficult or time consuming operation, and could be accomplished by competent engine room personnel in a matter of approximately one minute.

4. The UNION RELIANCE was equipped with a hydraulic steering system, located in the steering engine room (to be distinguished from the engine room, where the main engines were installed). Hydraulic rams served to move the rudder in the desired direction. Hydraulic fluid (or telemotor oil) under great pressure actuated the rams.

Two separate and distinct steering systems were available to force the hydraulic fluid, under pressure, through the system and against the rams. These were used alternatively; while one was in use, the other served as standby.

The principal component of each such steering system was a large pump. The pump was powered by a 50 horsepower electric motor. There were a number of auxiliary pumps and motors, of particular relevance here being a small so-called "replenishing pump."

In normal operation, hydraulic fluid escaped from the system and was collected in a sump tank. It was then lifted by means of this replenishing pump to an overhead replenishing tank, from which point it was fed back into the system for further use through gravity. The replenishing pump was powered by a one horsepower electric motor.

Some 35 gallons of hydraulic fluid were required to fill each system. While some minor leakage was expected, in normal operation it should have been necessary to add only small quantities of fluid at infrequent intervals.

5. The BEREAN was built in Norway and delivered to her owner and operator, A/S A. O. Andersen & Co., a Norwegian corporation, in April, 1961. She is 508 feet long, 65 feet in beam, powered by one 9000 horsepower diesel engine. She has no midships house; her navigating bridge is in the forward part of the after house, some 350 feet from the bow.

6. The cargo space of the BEREAN is divided into 42 tanks. She is designed and equipped to carry many varieties of bulk liquids. Some tanks are stainless steel lined; others are equipped with heating coils for handling viscous liquids, etc. She had been engaged in the chemical trade during the several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The shell of the ship constitutes the outer wall of certain of her wing tanks. There were no

protective cofferdams or protective voids surrounding such tanks. Under pertinent Coast Guard regulations, those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics", under 46 C.F.R., Part 39.

*The Cargoes and Movements Preceding the Casualty*

7. Following her purchase from Greek interests, UNION RELIANCE sailed from Piraeus, Greece, through the Mediterranean and to the United States, calling at Tampa, Florida, and New Orleans, Louisiana. By this time her Captain and crew had discovered that extensive repairs were needed in the engine room, the most immediate need being for an overhaul of the engine control mechanism. A marine surveyor and engine expert, one Spindanger, together with an officer of petitioner, flew from New York to New Orleans to supervise these repairs. While these repairs to the engine controls were underway, each of the four main engines was opened, and the cylinder heads were found badly worn and eroded. Replacements were not readily available and the old cylinder heads were re-installed. Spindanger made a full report to the owners of the work which he had accomplished, and of other work which he recommended, to place the engine room in proper condition. While the New York office of petitioner was aware of the contents of this report promptly, it was not received in Taiwan until after the collision.

On departing New Orleans, UNION RELIANCE proceeded to Houston, thence through the Panama Canal, up the Pacific Coast, and thence to Japan and Taiwan. Additional engine repairs were accomplished in Taiwan.

Her Captain, chief engineer and others of her complement were replaced, and the officers and crew who were aboard at the time of the casualty took over the vessel in Taiwan. She loaded a general cargo there and in Japan for carriage to the United States. She discharged a part of this cargo at Los Angeles and received aboard at that port five of the large number of piston heads which were needed for her main engines. However, these were never installed prior to the collision. From Los Angeles, she proceeded through the Panama Canal en route to Gult Ports.

8. The UNION RELIANCE arrived in Houton November 5, 1961, discharged a portion of her cargo and left the Houston dock at 6:30 p.m. November 7. She proceeded seaward, unassisted by tugs, and with Houston Ship Channel Pilot Duncan on her bridge. She was drawing approximately 16 feet 8 inches forward and 23 feet 5 inches aft.

9. At approximately 8:30 p.m., while UNION RELIANCE was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system which was in use at the time. The engines were stopped, the anchors dropped, and the vessel brought to rest. The starboard steering system was disconnected, and the port system connected. It was tested by turing the wheel a number of times, and the rudder indicator showed that the rudder responded, and that the port system was operating properly. The anchors were lifted and the vessel again got underway. This was at about 9:00 p.m.

Repairs were promptly undertaken on the starboard steering system. It was found that a brush holder on the 50 horsepower electric motor which operated the starboard steering pump was defective. The chief electrician under-

took to repair the damaged part and had done so, but had not replaced the part in the engine. Hence the starboard steering system was not in operating condition from that moment forward.

The UNION RELIANCE proceeded outward from this point with the port steering system apparently functioning properly until shortly before the collision.

10. On November 6, 1961, the BEREAN loaded 14 tons of acrylonitrile at Good Hope, Louisiana. Upon the direction of the officers of the vessel, this shipment was placed in the forwardmost cargo tanks of the BEREAN, being No. 1 port, No. 1 center, and No. 1 starboard.

11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. Acrylonitrile is and was at the time of the casualty classified under pertinent Coast Guard regulations as a Grade C flammable liquid (46 C.F.R. 146.21-100), as is gasoline, benzine, naptha, etc. It is not classified as an "extremely dangerous poison", nor as a "less dangerous poison" (46 C.F.R. 146.25-5; 146.25-10).

12. The BEREAN arrived at the Galveston Bar at approximately 9:15 p.m. on November 7, 1961. In addition to the acrylonitrile mentioned above, BEREAN carried a mixed cargo of bulk liquids. She was drawing 19 feet forward and 25 feet aft. Houton Ship Channel Pilot Lary

boarded the BEREAN in the vicinity of the sea buoy and assumed active control of her navigation as she was proceeding inbound toward Houston.

13. From the sea buoy to the point of the collision and beyond, the Houston Ship Channel passes through the open and unobstructed waters of Galveston Bay. The channel has a dredged width of 400 feet and depth of 36 feet. Crossing Galveston Bay, the channel is relatively straight. When weather conditions are favorable, it is the custom and practice of most vessels to navigate this portion of the channel at "full ahead", except when passing other ships.

From Morgan's Point inward to Houston (being that portion of the channel which the UNION RELIANCE had navigated prior to the collision), the channel is more tortuous; there are many shoreside installations. Thus a vessel is required to maneuver to a far greater extent than in that portion of the channel outward from Morgan's point.

14. During the course of her passage from the sea buoy to the point of collision, Pilot Lary, her second mate (Haugen) and a helmsman were on the BEREAN's bridge at all times. Her captain (Larsen) was on the bridge a majority of the time, although he had repaired to his cabin shortly before the emergency presented itself, and returned to the bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour, and it was his duty then to proceed to the bow of the ship to serve as lookout for an hour, before returning to duty at the wheel. However, the practice was followed on the BEREAN, when weather and visibility were favorable and

the vessel was proceeding routinely, to permit the helmsman a 10-15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose.

Both bow anchors of the BEREAN were ready to be let go, but BEREAN had no one standing by the windlass to serve as anchor watch. By reason of the nature of the channel in that area, as set out above, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point.

15. The collision occurred in the Houston Ship Channel at a point between Five Mile Point and Red Fish Reef. At Five Mile Point (Beacons 75 and 76), the Ship Channel requires a turn of about 15 degrees to port from an outbound vessel, as was the UNION RELIANCE. From the point of this bend, to the scene of the collision and beyond, the channel is straight. Buoy 73 is located on the west side of the channel approximately seven-tenths of a mile below Beacon 75. Beacons 71 and 72 are located opposite one another, at a point approximately seven-tenths of a mile below Beacon 73.

16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour.

17. UNION RELIANCE was navigating at a speed of 9-10 knots over the ground when she made the bend at Five Mile Point. Each vessel saw the lights of the other at about this time. BEREAN blew a one blast signal, which was not answered by UNION RELIANCE.

18. In negotiating this turn, UNION RELIANCE navigated somewhat to her starboard side of the channel, and away from the center line of the channel. This was noted and commented upon by the pilot of the BEREAN. This maneuver was of little consequence, however, and did not cause the vessel to sheer away from the starboard bank, did not cause loss of control of her steering, and did not precipitate the casualty (as is contended by petitioner).

19. In negotiating the turn in the channel to her port, the UNION RELIANCE pilot ordered her rudder 5 degrees to port. This was at approximately 11:10 p.m. The rudder responded to this movement of the wheel, and the vessel started her turn to port. However, at this point the steering gear of the UNION RELIANCE failed with the rudder in the 5 degree port position, and she continued to swing under that rudder setting. The quartermaster was unable to move the wheel in either direction. She never straightened her course thereafter.

20. When it became evident to the Captain, the pilot, and quartermaster that the wheel would not respond, by engine order telegraph the bridge notified the engine room to reduce speed, and shortly thereafter to stop. The third mate, who was on watch, was ordered by the Captain to search out the chief engineer and advise him of the rudder failure. The engine room was ordered to give full speed astern to the engines.

21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE.

22. Efforts to transfer the steering control on the bridge of the UNION RELIANCE from the telemotor system (which had been in use) to the gyro-pilot was unsuccessful, and UNION RELIANCE continued to swing to her port out of control. Prior to the emergency, UNION RELIANCE's four engines had all been coupled in the ahead position for maximum forward speed. On receiving the order for full power astern, the engine room undertook to, and did, reverse one set of two engines, and coupled same to the propeller shaft to give astern power. Nevertheless, the vessel continued in her swing to port with some headway. The remaining two engines were never reversed and coupled to the shaft, for reasons which will be noted hereafter.

UNION RELIANCE continued to have headway until she collided with the port side of the bow of the BEREAN at 11:13-1/2 p.m.

23. The pilot of the BEREAN observed the UNION RELIANCE as she was in the turn of the channel mentioned above, and about 3 miles away. Prior thereto, BEREAN had been navigating at "full ahead" and was making 13 to 14 knots. On observing UNION RELIANCE coming out of the bend, at approximately Beacon 75 and 76, BEREAN's speed was reduced to "half ahead" and shortly thereafter to "slow ahead". It was at this time that the one blast signal was given by BEREAN. While it was not answered, the BEREAN pilot expected to make a normal port to port passing.

The pilot of the BEREAN noted, and commented to the watch officer, that UNION RELIANCE was somewhat closer to her starboard bank of the channel than was necessary or customary in making the bend. They watched her

swing to her port, and became somewhat apprehensive. BEREAN turned slightly to her starboard, expecting to negotiate the port to port passing. However, a three blast signal from UNION RELIANCE was heard, and the sound of the anchor letting go was heard at approximately the same time, and the pilot of the BEREAN immediately recognized that an emergency presented itself. He blew three blasts in return, and immediately ordered full speed astern on the BEREAN's engines and gave her hard right rudder, intending to put her aground in the mud bank at the side of the channel. These orders were complied with. At this time, the vessels were approximately one-fourth mile apart, and were closing on each other.

24. At this time, and since 11:00 p.m., the BEREAN had been without her regular bow lookout. This resulted from the fact that at 11:00 the lookout had returned to the bridge to relieve the seaman at the wheel. The helmsman, before going forward to assume the bow lookout, was directed to fetch coffee for those on the bridge and was engaged in doing so during this interval.

25. The BEREAN had no one standing by to drop her anchors. When the BEREAN pilot recognized the emergency condition of the UNION RELIANCE (when he ordered the engines full astern, the hard right rudder), he likewise ordered the starboard anchor dropped. The watch officer who was on the bridge with the pilot immediately went forward for the purpose of letting go the anchor. However, before he reached the bow, the watch officer felt BEREAN go aground in the mud, and observed UNION RELIANCE bearing down upon the port bow of his vessel in such fashion that he recognized that a collision was in-

evitable. Hence he did not continue forward, and did not let go the BEREAN anchor, but returned to the bridge.

26. BEREAN ran aground into the mud on her starboard side of the channel immediately before or about the time of the impact. She had little, if any, headway, though the violent wheel maneuver and her efforts to stop caused her stern to swing somewhat to port and across the channel. The bow of the UNION RELIANCE struck BEREAN on her port side somewhat behind her stem. The UNION RELIANCE had lost most of her speed at this time. The impact was not severe, and injured no one. It was hardly felt in some portions of the two vessels. However, the bow of UNION RELIANCE breached the No. 1 port tank of BEREAN, causing its acrylonitrile cargo to become ignited and to explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited. The vessel continued to burn for several days, as noted above, and she became a constructive total loss.

27. As result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew.

*Fault and Negligence*

28. The primary and direct cause of the collision was the failure of UNION RELIANCE to keep to her starboard

side of the channel. This resulted from a failure of her port steering system (her starboard steering system having previously failed) and constituted a violation of the provisions of 33 U.S.C.A., Sections 203 and 210. This constituted fault and negligence on the part of UNION RELIANCE.[1]

29. By reason of the extensive damage to the entire bridge, the wheel, and that portion of the telemotor system on the bridge caused by the fire, the cause of the steering failure cannot be determined with as high a degree of certainty as is desired. However, the steering engine room was not damaged. From the evidence which I consider most credible, and the most likely circumstances, it appears, and I find, that the failure of the port steering system resulted from a loss of hydraulic fluid; and the loss of hydraulic fluid, in turn, was caused by the failure of the one horsepower electric motor which powered the replenishing pump for the port steering system.[2]

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[1] There was much testimony on the trial from both sides attempting to explain the movement of UNION RELIANCE to her port and across the channel. Petitioner's theory was that she had approached too close to her starboard side of the channel and, by reason of suction caused thereby, she had sheered to her port; was never able to right herself; and continued the sheer completely across the channel. This is supported by a little more than (1) evidence that she did in fact approach closer to her starboard bank than was customary, (2) a suggestion from the pilot of the BEREAN that this might have caused her to behave in this manner. There is no substantial evidence that this in fact did cause this movement; while there is uncontradicted evidence from all of the officers and members of the crew of UNION RELIANCE who were in position to know, that her steering system failed.

[2] In normal operation, telemotor oil leaks from the main pump into a sump tank. The oil is lifted from the sump tank to an overhead tank, from which it again goes into the system by gravity flow. Thus, if the replenishing pump is not operative (or if the electric motor which powers it is not operative) in a matter of a few hours the oil in the system is exhausted, the system be-

30. The failure of the small motor powering the port replenishing pump was due to the fact that a fuse was burned out in the electrical lines serving that motor. This occurred in all probability when the port steering system was put in operation following the original steering failure at about 9:00 p.m. This resulted from the fact that the chief electrician made use of a certain wooden block to circumvent the safety and protective feature of an electric solenoid in the electrical system serving this motor.[3]

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comes filled with air, and the rams do not cause the rudder to respond.

This explanation is strongly supported by the uncontradicted testimony that on the occasion of the joint survey the port system was practically devoid of hydraulic fluid, and when power was applied, moved erratically, if at all; but that after some 30 to 35 gallons of telemotor oil was added, it operated properly. I am convinced that this loss of fluid resulted prior to the collision and was the cause of the steering failure. I am unable to accept the explanation offered by petitioner that the oil leaked out after the collision and before the survey.

[3] As in the preceding finding, the evidence does not conclusively show the cause of this failure. I credit, however, the following testimony.

Shortly before or in the course of the joint survey, a fuse was found to be burned out in the electric circuit which controlled the one horsepower motor serving the port replenishing pump. There is no direct evidence as to when the fuse was blown. However, from the time the vessel was received from its Greek owners, the chief electrician had made use of a wooden block to prop and secure in place an electric solenoid in the electric circuit serving this motor (another block was used in a similar fashion in another line). This solenoid was designed to protect the motor from the full surge of electrical current when the motor is switched on, and to permit the current to be applied gradually. If an unduly heavy surge of current passed through the line, the solenoid was designed to drop open, breaking the circuit, and protecting the motor. The wooden block held the solenoid in place and thus rendered the protective feature inoperative. This was

31. The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost con-

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calculated to cause a blown fuse when this motor was engaged. Had this occurred at about 9:00 p.m. and the system not been replenished with hydraulic fluid, the fluid well might have been exhausted, and the system inoperative, by 11:00 p.m.

This testimony as to the blown fuse came from the witness J. R. Bencal and the following circumstances surrounding this testimony should be noted. Mr. Bencal is a recognized and, I believe, highly regarded marine surveyor in the Port of Houston. As stated earlier herein, he was employed almost immediately following the casualty by the petitioner and undertook to represent petitioner's interest throughout. He was in charge of the team of surveyors representing petitioner at the joint survey (which included Spindanger, an expert on the main engines, and Tarabochia, an expert on hydraulic steering systems). As stated heretofore, Bencal was appointed by the Court as salvage master at petitioner's suggestion, and by reason of his services in this regard in extinguishing the fire, his early examination of the vessel and her cargo, he was probably more familiar with the situation which prevailed aboard UNION RELIANCE following the casualty than any other individual. He was not called as a witness by petitioner. When he likewise was not called as a witness by the respondents (who obviously were fearful of being bound by his testimony), the Court summoned Bencal as a witness and advised all parties that they might cross-examine, and not be bound by his testimony. It was he alone who has testified as to the blown fuse of the electric motor mentioned above. As his memory had been refreshed from notes made at the time and the report written to his principals shortly after the joint survey, I find no reason why his testimony on this point should not be accepted.

stant difficulties encountered with the main engines, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction.

32. The UNION RELIANCE was unseaworthy from the inception of the voyage in which she was engaged, by reason of the incompetence and inability of her Captain, chief engineer, and other crewman to operate and maneuver UNION RELIANCE properly, efficiently, safely, or within her full potential. Specifically, I find that neither the Captain nor chief engineer was aware of the fact that all four of her main engines might be coupled astern. There was no agreed signal whereby the bridge could order the engine room to couple all four engines astern. By reason of this lack of knowledge, only half of the potential backing power of UNION RELIANCE was applied in an effort to stop her forward movement before the collision. Additionally, the Captain was unaware that reverse power might be applied in a very short time (probably a matter of one minute) if the engine room crew operated efficiently.[4]

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[4] It is clear from the evidence that neither the Captain nor the chief engineer was aware that the four engines might all be coupled astern, and thought that only two might be so utilized. Spindanger testified that at the time of the repairs at New Orleans on her first voyage, he had explained fully to the engineering officers and crew how to change the engines from ahead to astern; how all four engines might be so utilized; and that the whole operation would take probably one minute. The Captain and chief engineer of that voyage were relieved in Taiwan, and replaced by Captain Shu and chief engineer Hsu Bah. The new chief engineer had never before sailed on a vessel with a similar four-engine arrangement, and had received instructions from his predecessor only during the course of a one day voyage.

On entering the Houston Ship Channel some three days before the accident, the Captain told Houston Ship Channel Pilot Collie

33. UNION RELIANCE was at fault in failing to make use of all four engines in going astern immediately prior to the collision. Had the additional astern power been applied, it is highly likely that the collision would have been avoided.

34. The telephone communication system between the bridge, the engine room, steering engine room, etc. aboard the UNION RELIANCE was inoperative. While the bridge might give signals to the engine room by means of the telegraph, there was no other means of communication except (as was done shortly before the collision) to send a messenger, or to station a man with a megaphone midway between the bridge and steering engine room, to relay messages. This obviously made the transmission of messages more difficult and slow, and decreased the efficiency of the vessel.

35. The fault and unseaworthy condition referred to in the preceding paragraphs were the result of petitioner's failure to exercise due diligence to make the UNION RELIANCE seaworthy, and the failure to equip her with a competent and experienced crew. The collision and losses resulting therefrom were occasioned with the privity and knowledge of petitioner.

36. The BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 p.m. until the time of the collision. On most careful consideration, I

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that if all four engines were hooked up ahead (as was done to get maximum speed and power in crossing the Galveston Bay portion of the channel), it would require 10 to 15 minutes before any astern power could be applied. Shortly before the collision, the Captain told Houston Ship Channel Pilot Duncan that about 10 minutes would be required to give astern power when the four engines were coupled ahead.

find that this failure did not, and could not have caused or contributed to the collision. This is so because Pilot Lary saw the UNION RELIANCE several miles away; observed her lights constantly thereafter; and by reason of his knowledge of and familiarity with the channel, he recognized that she was in difficulty at the earliest moment which circumstances permitted. He heard the only whistle signals given by UNION RELIANCE, and took immediate action. A lookout could have done nothing more.

37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger.

38. BEREAN was not negligent or at fault in traveling at the speed which she was making prior to the time that she observed UNION RELIANCE and slowed her speed for the anticipated passing.

39. BEREAN was not at fault in failing to have an anchor watch prior to and at the time of the collision. It is not the custom of ships to maintain an anchor watch in this portion of the channel, particularly when the vessel has sufficient power to maneuver readily. Additionally, I find that had the anchor of BEREAN been dropped when her pilot ordered, it would have had little, if any, effect in slowing the vessel under the circumstances which then prevailed, and would not have averted the collision. BEREAN took the quickest and most certain method of losing her headway by running aground.

40. BEREAN was not at fault in carrying acrylonitrile cargo in her forward wing tanks. She violated no Coast

Guard regulation by doing so, and I find this was not a negligent or careless manner of loading.[5]

41. BEREAN was not at fault in failing to go to port to undertake a starboard to starboard passing. She had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed within which such passing might have been accomplished safely, if at all.

42. The Captain and chief engineer of UNION RELIANCE were negligent by reason of their failure to familiarize themselves with their vessel and her engines and their failure to make proper use thereof prior to the collision. This negligence constituted a proximate cause of the collision. Any recovery in favor of the Captain and chief engineer will be reduced by fifteen per cent (15%).

43. The chief electrician of UNION RELIANCE was guilty of negligence in failing properly to inspect and maintain the electrical equipment and circuits in the steering engine room of his vessel. This constituted a proximate cause of the collision. Any recovery in favor of the chief electrician should be reduced by twenty-five per cent (25%).

44. The services rendered to the UNION RELIANCE while she was at anchor in Bolivar Roads, and subsequent thereto, by the United States were, in the light of circum-

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[5] While petitioner offered evidence tending to show that a greater safety factor would result if there were inner lining of the tank so that an air space was maintained between the skin of the ship and the outer wall of the wing tanks, these experts conceded that it was the custom and practice to carry gasoline and other inflammable and explosive liquids in tanks immediately adjacent to the skin of the ship.

stances then existing, reasonable and necessary; and the charges made therefor reasonable in amount and consistent with charges generally made for similar services in that vicinity.

45. Certain speed and performance tests were made of the BEREAN shortly prior to the trial. The purpose was to show how she would react under conditions similar to those which existed at the time of the collision. The tests were made in the area in which the collision occurred. Evidence of these tests was received subject to objection. On careful consideration, I am of the view that these tests were not made with a sufficiently high degree of accuracy, and were not sufficiently consistent within themselves, to be of any probative value. Hence this evidence has not been considered.

46. From the foregoing findings, it is apparent that in general the Court has adopted the theory and the contentions of BEREAN, and rejected those of UNION RELIANCE. It is felt that the foregoing findings are supported by a clear preponderance of the evidence. It should be noted, however, that on many of the issues the evidence is in sharp and irreconcilable conflict. In weighing the evidence, notice was taken of the fact that several of the principal witnesses of petitioner were impeached regarding matters of great importance. Note is made of the following examples:

(a) Some 48 hours following the collision, as the senior surviving and uninjured officer of UNION RELIANCE, the third mate was directed to prepare a report of the casualty for his company. He did so in longhand. While the Captain was hospitalized with

severe burns, this report was read to him and received his tacit, if not express, approval and in due course was forwarded to the company. In early pre-trial procedures when extensive exchange of documentary evidence between the parties was had, this report was withheld by petitioner. It was only after trial had begun, and after strenuous efforts by proctor for petitioner, that this document was secured from Taiwan. I am of the view that it was deliberately withheld. This report was inconsistent with the theory advanced by UNION RELIANCE in a number of important respects.

(b) At the original Coast Guard hearing, a few days following the casualty, the chief engineer of UNION RELIANCE testified that his vessel had been using only two engines in running ahead, with two engines standing by to use for astern power. Thereafter the engine room bell book was recovered which showed to the contrary. He changed his testimony thereafter.

(c) The explanation of the chief electrician of UNION RELIANCE regarding his use of the wooden blocks in the starter boxes was entirely unsatisfactory. This is particularly so as he testified that the block in question controlled the replenishing pump motor on the *starboard steering engine* (which, of course, was not in use immediately prior to the collision). Testimony of all of the surveyors showed conclusively that it controlled the replenishing pump motor on the *port* steering engine.

## CONCLUSIONS OF LAW

1. This Court is vested with jurisdiction of these proceedings.

2. Petitioner China Union Lines, Ltd. is not entitled to exoneration from or limitation of its liability with respect to the claims made against it.

3. The UNION RELIANCE was grossly at fault, and in violation of the statutes mentioned above, and she and her owners are held solely responsible.

4. The only fault of the BEREAN having been one which did not and, under the circumstances, could not have contributed to the collision, A/S Andersen & Co., and the BEREAN *in rem* are not liable to any of the libelants who have made claims against them, and are exonerated and freed of liability in these actions.

5. China Union Lines, Ltd. is not entitled to recover any expense from its cargo as general average.

6. China Union Lines, Ltd. is liable to American Cyanimid Company for loss of its cargo aboard the BEREAN.

7. China Union Lines, Ltd. is liable to Lucy Duncan, surviving widow of Houston Ship Channel Pilot Duncan, for his death resulting from the fault and negligence of petitioner.

8. China Union Lines, Ltd. is liable to the legal representatives or next of kin of the members of the crew of UNION RELIANCE who were killed as result of the casualty; and to those members of the crew who received personal injuries or loss thereby, subject to the reduction by reason of their own negligence as set out in the preceding findings.

9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States.

Done at Houston, Texas, this 17th day of July, 1963.

BEN C. CONNALLY
Ben C. Connally
United States District Judge

## APPENDIX E

### Memorandum

(January 28, 1963)

* * *

"*Claim of the United States Government—*

"The United States makes claim for 35,801.38. This consists of a number of items, some for preparing and towing the disabled vessel to an anchorage in Bolivar Roads November 10, 1961; for services of a standby tug while so anchored November 10-27, 1961; for hire of a 'ship keeper', around the clock, November 27, 1961 to January 12, 1962; and for overhead charges of the Corps of Engineers.

"As noted earlier, following the collision the Union Reliance was a burning wreck swinging on her anchor in the Houston Ship Channel. This navigable waterway was effectively blocked, with a number of vessels trapped up stream in the Port of Houston. Under § 409 of Title 33, U.S.C.A., the duty was imposed upon Petitioner immediately to remove the wreck and to clear the Channel. Petitioner was unable or unwilling to do so, and her representative (Mr. Eikel) so advised the Engineers. Proceeding under § 415 of Title 33, U.S.C.A. on November 10, while still unable to board the vessel the Engineers had her anchor cut and the vessel towed to safe anchorage in Bolivar Roads. The sum of $8,582.00 was expended for this operation. I find that this sum was properly spent for this purpose by the Engineers, was reasonable in amount, and was necessary to clear the Channel.

"Proceeding under § 415 of Title 33, U.S.C.A., the United States filed its libel in this Court November 17, 1961, seeking sale of the vessel and her cargo, and seeking personal recovery against Petitioner for certain other expenses alleged to constitute legitimate salvage

items. When the limitation proceeding was filed herein November 28, 1961, this libel by the United States, together with others against Petitioner, was enjoined. On more careful consideration I have concluded that this Court was in error in restraining the sale of the vessel and her cargo, in the event reimbursement was not made within the thirty day period provided by § 415.

"Under this Section, and the authorities interpreting it, it seems clear that these costs of clearing the navigable waterway do not give the United States an in personam claim against the shipowner. Loud v. United States 286 F. 56 (6th Cir.); Hagan v. Richmond, 52 S.E. 385; Petition of Highlands Nav. Corporation, 29 F. (2d) 37 (2nd Cir.); 56 Am. Jur. 687, WATERS, § 227. They create no 'liability of the owner of any vessel . . . . . for any embezzlement, loss or destruction . . . .' of any goods shipped on such vessel; or for any 'loss, damage, or injury by collision,' or otherwise, which may be limited under the terms of § 183 of Title 46, U.S.C.A. There is no liability of the owner at all. Rather, these costs are an in rem charge against the vessel and her cargo, to recover which the United States may sell both vessel and cargo. The United States was undertaking to follow this statutory procedure. She had maintained possession of the vessel, through the presence of the ship keeper and Deputy U.S. Marshal, until this Court intervened and took custody through its trustee under the limitation proceeding.

"Had this Court not intervened, on the Government's claim remaining unpaid by December 10, 1961, (being thirty days after the expense was incurred) the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel.

The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A.

"The other items of expense composing the claim of the United States were incurred after the vessel reached anchorage in Bolivar Roads. These were not a necessary part of clearing the Channel, and the extraordinary rights afforded by § 415 do not attach thereto. While—as the United States contends—the Union Reliance thereafter constituted a potential hazard to navigation—it does not follow that all of the expenses incurred by the Engineers in performance of their duty to protect commerce may be taxed here. I withhold passing upon whether this remaining portion of the Government's claim constituted salvage expense until trial on the merits."

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## APPENDIX F

### Statutes and Regulations Involved

1.

*Statutes Here Pertinent to Dangerous Cargoes*

*46 U.S.C. § 170*

"Regulation of carriage of explosives or other dangerous articles on vessels—Vessel defined"

"(1) The word 'vessel' as used in this section shall include every vessel, domestic or foreign . . . on the navigable waters of the United States . . .; it shall not include any . . . vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in its own tanks . . ."

* * *

"Transportation, etc., of other explosives or other dangerous articles; exceptions

"(6) (a) It shall be unlawful knowingly to transport, carry, convey, store, stow, . . . on board any vessel, except one specifically exempted by paragraph (b) of this subsection, any other explosives or other dangerous articles or substances, including inflammable liquids, . . . poisonous articles or substances, hazardous articles, . . . except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: . . .

"(b) This subsection shall not apply to—

* * *

"(vi) inflammable or combustible liquid cargo in bulk: Provided, however, That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title."

"Regulations for protection against hazards created by explosives or other dangerous articles

"(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)-(5) or (6) of this section apply—

"(a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section with respect to the descriptive names . . . and certification of such explosives or other dangerous articles or substances, . . . and shall accept and adopt for the purposes above mentioned in this subsection such definitions, descriptions, descriptive names, classifications, specifications of containers, packing, marking, labeling and certification of explosives or other dangerous articles or substances to the extent as are or may be established from time to time by the Interstate Commerce Commission insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water. The Commandant of the Coast Guard shall also establish regulations with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessels; . . .

"(b) The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall, insofar as applicable to them, resepectively, be binding upon shippers and the owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances: . . .

"(d) Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder."

* * *

"Tendering explosives or other dangerous articles for shipment without divulging true character or in violation of section

"(10) It shall be unlawful knowingly to deliver or cause to be delivered, or tender for shipment to any vessel subject to this section any explosives or any other dangerous articles or substances defined in the regulations of the Commandant of the Coast Guard established hereunder . . . without informing the agent of such vessel in writing of the true character thereof at or before the time such delivery or transportation is made . . ."

*46 U.S.C. § 391(a)*

"Vessels having on board inflammable or combustible liquid cargo in bulk

"(1) Vessels included

"All vessels . . . that shall have on board any inflammable or combustible liquid cargo in bulk . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: . . ."

"(2) Rules and regulations for handling liquid cargo

"In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary . . . with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; . . ."

* * *

"(4) Certificate of inspection and permit required; time of indorsing permit; inspection; duration of permit; vessels of foreign nations; permit for prohibited materials

"No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations established hereunder, have on board such liquid cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes and until a permit has been endorsed on such certificate of inspection by the Coast Guard, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations established hereunder . . ."

*Coast Guard Regulations Thus Pertinent*

*46 C.F.R. § 39.01-1*

"Scope of regulations—TB/ALL.

"(a) The regulations in this part contain requirements for the transportation of inflammable or combustible liquids having lethal characteristics and defined as Class 'B' or 'C' poisons in §§ 146.25-10 and 146.25-15 of Part 146 of Subchapter N (Explosives or Other Dangerous Articles on Board Vessels) of this chapter. The regulations covering the transportation in portable tanks of inflammable or combustible liquids having lethal characteristics defined as Class 'B' or 'C' poisons are contained in Part 146 of Subchapter N (Explosives or Other Dangerous Articles on Board Vessels) of this chapter."

*46 C.F.R. § 39.05-1*

"Design, construction, and arrangement—TB/ALL.

"(a) Cargo having a Reid vapor pressure not exceeding 14 pounds per square inch may be transported in tanks, cylindrical or rectangular, independent of the vessel's hull structure, or in tanks built integral with the vessel's hull and completely separated from the shell of the vessel by means of wing tanks, cofferdams, double bottoms or similar voids."

*46 C.F.R. § 146.01-1*

"Purpose of regulations.

"The purpose of the regulations in this subchapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States . . ."

*46 C.F.R. § 146.02-5*

"Compliance.

"The applicable provisions of the regulations in this part shall be observed by:

"(a) All vessels, domestic or foreign, subject to the regulations in this part, and the owners, charterers, agents, masters or persons in charge of such vessels;

* * *

"(c) All shippers, their agents or other persons offering explosives or other dangerous articles or substances, and combustible liquids for transportation on board vessels;

"(d) All persons engaged in the acceptance, handling, stowage, storage or transportation of explosives or other dangerous articles or substances, and combustible liquids on board vessels;

"(e) All shippers or carriers of explosives or other dangerous articles or substances, and combustible liquids shall instruct their employees relative to the provisions of the regulations in this part."

*46 C.F.R. § 146.03-8*

"Dangerous articles defined.

"A dangerous article within the meaning of the reg-

ulations in this subchapter is an article falling within any of the following classifications:

Explosives.

Inflammable Liquids.

. . .

Poisons.

Hazardous Articles.

. . .

"For definitions covering these classifications see the appropriate section within this subchapter. These are . . . 146.25-1-146.25.20. . . . Combustible Liquids are defined in § 146.26-1."

*46 C.F.R. § 146.04-5*

"List of explosives and other dangerous articles and combustible liquids:

| | *Classed* | *Label required* |
|---|---|---|
| . . . | | |
| Acrylonitrile | Inf. L* | Red |
| . . . | | |
| Hydrocyanic acid | Poison A | Poison gas" |

(*Inflammable Liquid)

*46 C.F.R. § 146.25-5*

"Extremely dangerous poisons, Class A, poison gas label.

"Poisonous gases or liquids of such nature that a very small amount of the gas, or vapor of the liquid, mixed with air is dangerous to life. This class includes the following:

. . .

Hydrocyanic acid.[1]

. . .

1. Dilute solutions of hydrocyanic acid of not exceeding 5 percent strength are classed as poisonous articles, Class B."

*46 C.F.R. § 146.25-10*

"Less dangerous poisons, Class B, liquids and solids, poison label.

"(a) Poisonous liquids or solids (including pastes and semi-solids), other than Class A, C, or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation, or which, in the absence of adequate data on human toxicity, are presumed to be toxic to man because they fall within any one of the following categories when tested on laboratory animals:

"(1) *Oral toxicity.* Those which produce death within 48 hours in half or more than half of a group of 10 or more white laboratory rats weighing 200 to 300 grams at a single dose of 50 milligrams or less per kilogram of body weight, when administered orally.

"(2) *Toxicity on inhalation.* Those which produce death within 48 hours in half or more than half a group of 10 or more white laboratory rats weighing 200 to 300 grams, when inhaled continuously for a period of 1 hour or less at a concentration of 2 milligrams or less per liter of vapor, mist, or dust, provided such concentration is likely to be encountered by man when the chemical product is used in any reasonable foreseeable manner.

"(3) *Toxicity by skin absorption.* Those which produce death within 48 hours in half or more than half of a group of 10 or more rabbits tested at a dosage of 200 milligrams or less per kilogram body weight, when administered by continuous contact with the bare skin for 24 hours or less.

"(b) The foregoing categories shall not apply if the physical characteristics or the probable hazards to humans as shown by experience indicate that the substances will not cause serious sickness or death. Neither the display of danger or warning labels pertaining to use nor the toxicity tests set forth above shall prejudice or prohibit the exemption of any substances from the provisions of the regulations in this part."

2.

*Wreck-Removal Act*

33 U.S.C. § 415—"Summary removal of water craft obstructing navigation

"Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or

refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. Mar. 3, 1899, c. 425, § 20, 30 Stat. 1154."

3.

*Exoneration to Cargo from Loss by Fire*

*46 U.S.C. §182*

"Loss by fire

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S. § 4282."

*Carriage of Goods by Sea Act*

*46 U.S.C. § 1308*

"Rights and liabilities under other provisions of Title 46

"The provisions of this Act shall not affect the rights and obligations of the carrier under . . . under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, 46 U.S. Code 181-189, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels."

4.

*Limitation of Liability*

*46 U.S.C. § 183(a)*

"Amount of liability; loss of life or bodily injury; privity imputed to owner; 'seagoing vessel'

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

5.

NAVIGATIONAL

*Statutes*
(and Pilot Rules)

33 U.S.C. § 203—"Steam vessels approaching, meeting, or passing one another; . . . (Art. 18)

"Rule I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other." (Pilot Rules for Inland Waters, 33 C.F.R. § 80.4(a).

* * *

"Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (Pilot Rules for Inland Waters, 33 C.F.R. § 80.1, with added words ". . ., the danger signal".)

33 U.S.C. § 210—"Steam vessel in narrow channel (Art. 25)

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel. June 7, 1897, c. 4, § 1, 30 Stat. 101." (Pilot Rules for Inland Waters, 33 C.F.R. § 80.10).

33 U.S.C. § 212—"Special circumstances requiring departure from rules (Art. 27)

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. June 7, 1897, c. 4, § 1, 30 Stat. 102." (Pilot Rules for Inland Waters, 33 C.F.R. § 80.11).

33 U.S.C. § 221—"Usual additional precautions required generally (Art. 29)

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. June 7, 1897, c. 4, § 1, 30 Stat. 102."

*Corps of Engineers*
*Navigation Regulations*

33 C.F.R. § 207.180—"All waterways tributary to the Gulf of Mexico . . .; use, administration, and navigation.

"(a) The regulations in this section shall apply to:

"(1) Waterways. . . .

* * *

"(e) Waterways—

* * *

"(3) Speed. . . .

* * *

"(ii) A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up, a wharf or other structure, works under construction, plant engaged in river and harbor improvement, levees withstanding flood waters, buildings submerged or partially submerged by high waters, or any other manner of structure or improvements likely to be damaged by collision, suction or wave action."

6.

*Supreme Court Admiralty Rules (former)*

Rule 51—"Limitation of liability—how claimed

"The owner . . . of any vessel who shall desire to claim the benefit of limitation of liability . . . may file a petition . . . Such petition shall . . . state facts showing . . . the amount of all demands including all unsatisfied liens or claims of lien . . .

"If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior para-

mount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip . . ."

*Supplemental Rules,*
*Admiralty and Maritime Claims*

"Rule F."
"Limitation of Liability"

"(1) *Time for Filing Complaint; Security.* Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner . . . (b) at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight . . .

"(2) *Complaint.* The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited . . . It shall state . . . the amount of all demands including all unsatisfied liens or claims of lien . . . and what actions and proceedings, if any, are pending thereon; . . . If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof . . ."

## FOREIGN STATUTES

Laws of the Republic of China, First Series-Major Laws, translated and compiled by the Executive Yuan of the Republic of China and printed with the assistance of the American AID MSM/C November 29, 1961:

*Civil Code-Book of Obligations*

* * * *

Article 192.

"A person who wrongfully caused the death of another is also bound to make compensation for damages to any person incurring the funeral expenses.

"If the victim was statutorily bound to furnish maintenance to a third party, the author of the act shall also make compensation to such third party for any damage arising therefrom."

Article 193.

"If, in consequence of a wrongful injury to the body or health of another, his earning capacity is lost or decreased, or an increase of his necessities arises, the author of the injury is bound to make compensation to the injured party for any damage arising therefrom.

"The Court may, on the application of the parties, order the aforesaid compensation to be made in periodical payments of money, but the Court must compel the author of the injury to furnish security."

Article 194.

"In case of death caused by a wrongful act the father, mother, sons, daughters and spouse of the deceased may claim for a reasonable compensation in money for such damage as is not a purely pecuniary loss."

6.

*Maritime Law*

Article 50.

"In the event of forced anchorage the ship because of sinking or running aground or facing any accident, or of any emergency happening to the ship, or cargoes, or crew members, or passengers, a report thereon shall be made by the shipmaster describing the actual situation of the happening and submitted to the authority-in-charge.

"The report referred to in the preceding paragraph shall bear the attestation of the crew-members or the passengers."

## APPENDIX G

*BEREAN pilot testimony, partial, re apprehension of collision*

At R. 3544:

"Q. Now, at 75 and 76, for the way the UNION RELIANCE was going, is there a bend in the channel?
A. That's right. Starting a 15 degree change there.
Q. All right, Going the direction that she is going, which way would she be turning to make the bend?
A. She would be turning to the left, to port.
Q. All right. Did you see the UNION RELIANCE at the time she was in the vicinity of 75 and 76?
A. Yes.
Q. All right, sir. Will you just tell the Judge in your own words, Captain, where you were at that time, and what you saw happen on the UNION RELIANCE, and what you did in your ship?
A. Well, after passing through 71 and 72, I saw this ship coming in the bend, Judge, at 75 and 76, and she was getting—you have got a set of green ranges right above 75 and 76, and I could see him go past those ranges, and I noticed that if he didn't swing pretty quick, he was going to go to that bank, to the west bank over toward 75 . . ."

At R. 3548:

"A. Yes, sir, when I—when she come in here and started across those ranges, I made the remark to the mate on watch, I said, 'That ship's getting over too far,' you know what I mean? In other words, he was going to have to swing her pretty good to bring her back on the ranges, and I saw him going, and then I could see him cross the ranges; you could see the top range as he went by—"

At R. 3549:

"Q. (By Mr. Harmon) Yes; draw a line there, Captain, and show what your ship did, now.

A. Well, I stayed in the middle, watching him, up to a point, I don't know just exactly, something like this (indicating), and then I changed the course, I think it was—either I changed it to 148 or 149, two or three degrees to the starboard. In other words, I brought it on over like this (indicating), something to that effect.

Q. All right, sir.

A. And roughly in this area, I'd say right here, as we were about roughly, I'd say, six-tenths of a mile apart, well, I heard his anchor chains going and I put her full astern."

At R. 3550:

Q. Now, at that time, Captain Lary, how far would you estimate the distance was between your ship and the UNION RELIANCE, at the time you heard his anchor chain going?

A. I'd say roughly six-tenths, six or seven-tenths of a mile.

Q. All right, sir. And at that time, did you hear any whistle blown by the UNION RELIANCE?

A. Yes, sir.

Q. What whistle did you hear him blow?

A. Three whistles."

At R. 3560:

A. No, I don't. Because the whole—the thing of it is—I would like to explain this to the Judge. I have had the same thing happen here in the last three or four days, a ship will come and get over, and can put his rudder hard over and break the sheer, if you understand what I mean. But what I was afraid of, up till the time that he blew the three-blasts and let go the anchor, I was figuring, 'That ship will break the sheer, and I will drop my ship on down through slow and dead slow,' and I was figuring he could break his sheer, and we could have a

regular, normal port-to-port passing. But at the time when he let the anchors go, then I knew that there was risk of a collision, I mean I knew there was trouble.

Q. Yes.

A. So the only thing I could figure to do then was put her and run her aground, which I did."

At R. 3587-3589:

"Q. Now, Captain, from you—I have asked you this question before, on your deposition, and you were asked the question generally: You have testified now before the Coast Guard and here and this deposition. It was your opinion that this ship was too close to that bank, and sheered off that bank; that is what caused her to come across, is that right?

A. The reason for the collision?

Q. Yes, sir.

A. She was over on that side, and she come off, yes, sir. I have stated that.

Q. And you have testified that she sheered off that bank; isn't that what you said?

A. That's right, she came off that bank.

Q. Well, you testified that she was too close to that bank, and that is what caused her to come off that bank, the sheer, isn't that right?

A. Yes, that's what I have said.

Q. And that was your opinion before the Coast Guard, and you reaffirmed that opinion in February when we took your deposition?

A. That's right.

Q. And that's still your opinion, is that right?

A. That's right..

Q. And the way you arrived at that opinion was that you saw both those range lights to the east of the UNION RELIANCE as she made that turn at 75-76 buoys or beacons, isn't that right?

A. That's right.

Q. And you testified positively before that you saw both those range lights which mark the center of the channel, of course, and they were clear of the ship's lights when she was making that bend at 75-76, isn't that correct?

A. In other words, the ship was to the west of the—

Q. Of the center of the channel?

A. Of the center of the channel at that time?

Q. Yes, sir.

A. That's right.

Q. And you could see her lights plainly, and you could see the range lights plainly?

A. That's correct.

Q. All right, sir. And that is fundamentally the real reason why you think she sheered off that bank, isn't that correct?

A. That's correct.

Q. Yes, sir. And you testified, at the time of taking your deposition, that you remarked to the mate, and you testified before the Coast Guard, 'She is going to have trouble, because she is too close to that bank,' isn't that right?

A. Well, I said she was not—I was concerned that she—

Q. Yes, sir.

A. I think I made the statement to the second mate.

Q. All right, sir. And you testified to that statement?

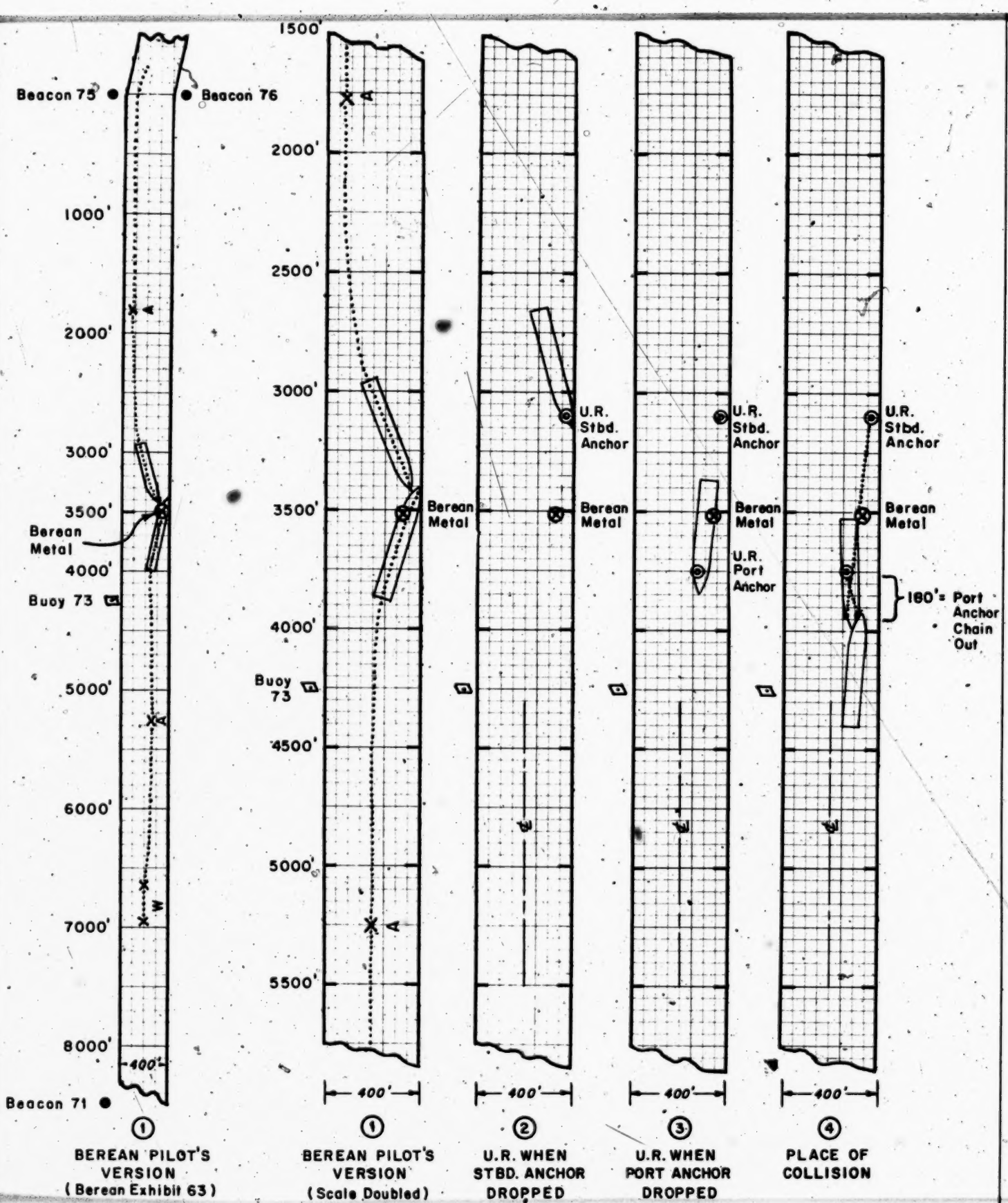
A. I said, 'That ship's getting over too far,' something to that effect.

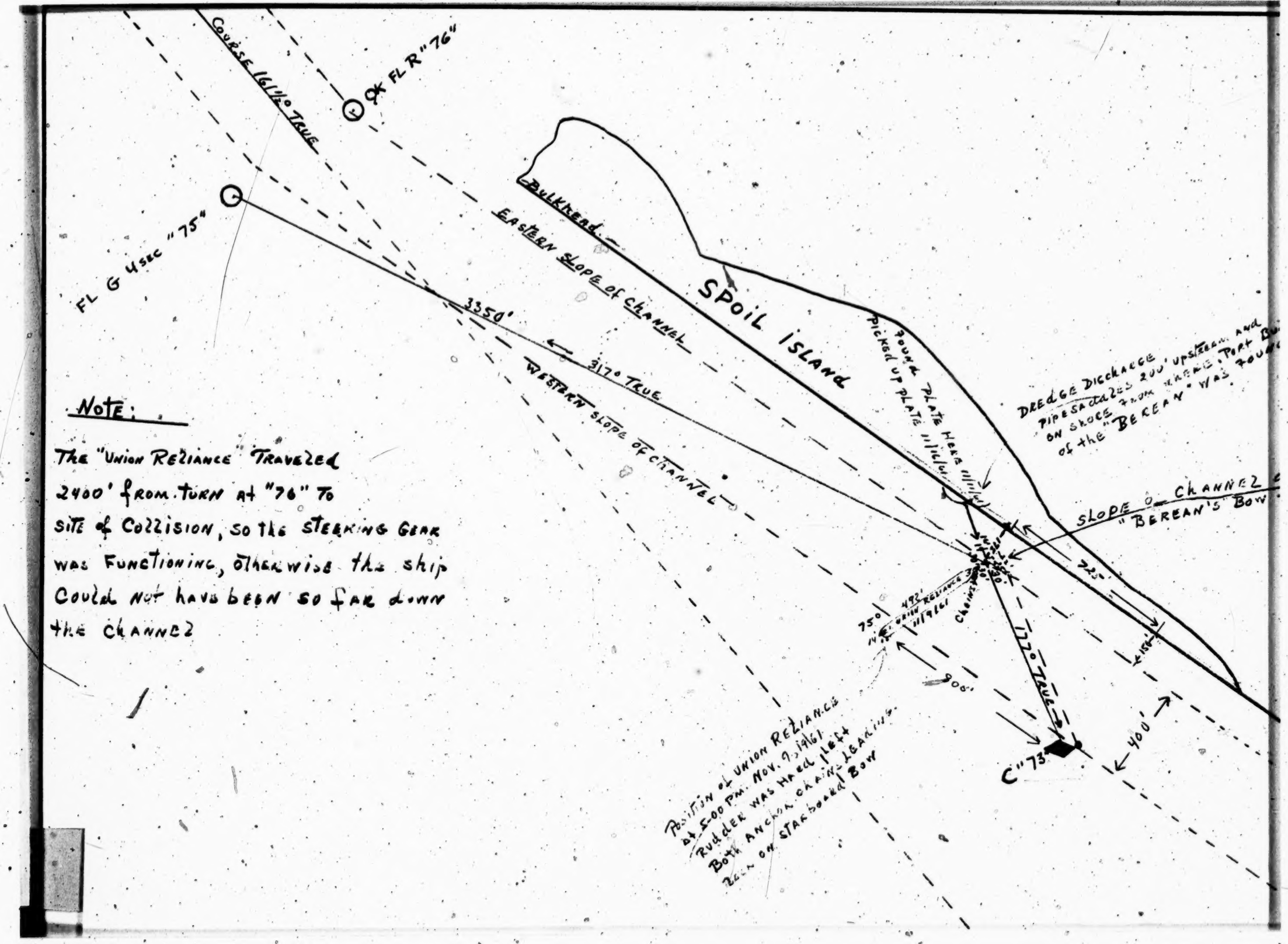
Q. Yes, sir. And you testified on your deposition that you had been here yourself, and you knew that a ship over that far would in all likelihood sheer; isn't that correct?

A. That's correct.

Q. Yes, sir; and you thought so that night when you first saw her getting over too close, at the time she was passing beacons 75 and 76, isn't that right?

A. That's the reason I dropped my speed to dead slow."


Beacon 75
Beacon 76
1000'
2000'
3000'
3500'
Berean Metal
4000'
Buoy 73
5000'
6000'
7000'
8000'
400'
Beacon 71
1500'
2000'
2500'
3000'
3500'
Berean Metal
4000'
Buoy 73
4500'
5000'
5500'
400'
U.R. Stbd. Anchor
Berean Metal
U.R. Port Anchor
180' = Port Anchor Chain Out
① BEREAN PILOT'S VERSION (Berean Exhibit 63)
① BEREAN PILOT'S VERSION (Scale Doubled)
② U.R. WHEN STBD. ANCHOR DROPPED
③ U.R. WHEN PORT ANCHOR DROPPED
④ PLACE OF COLLISION



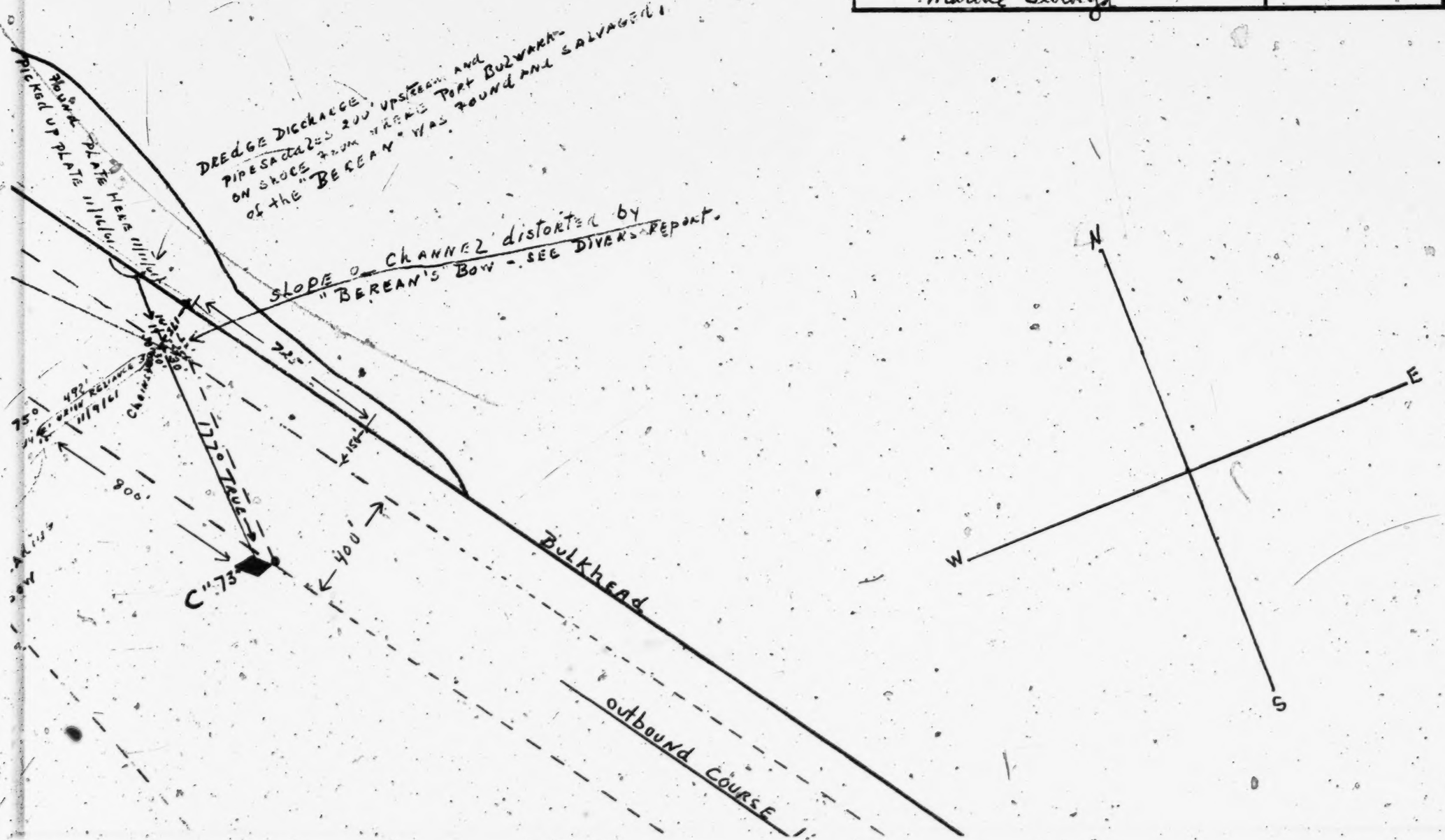

**Note:**

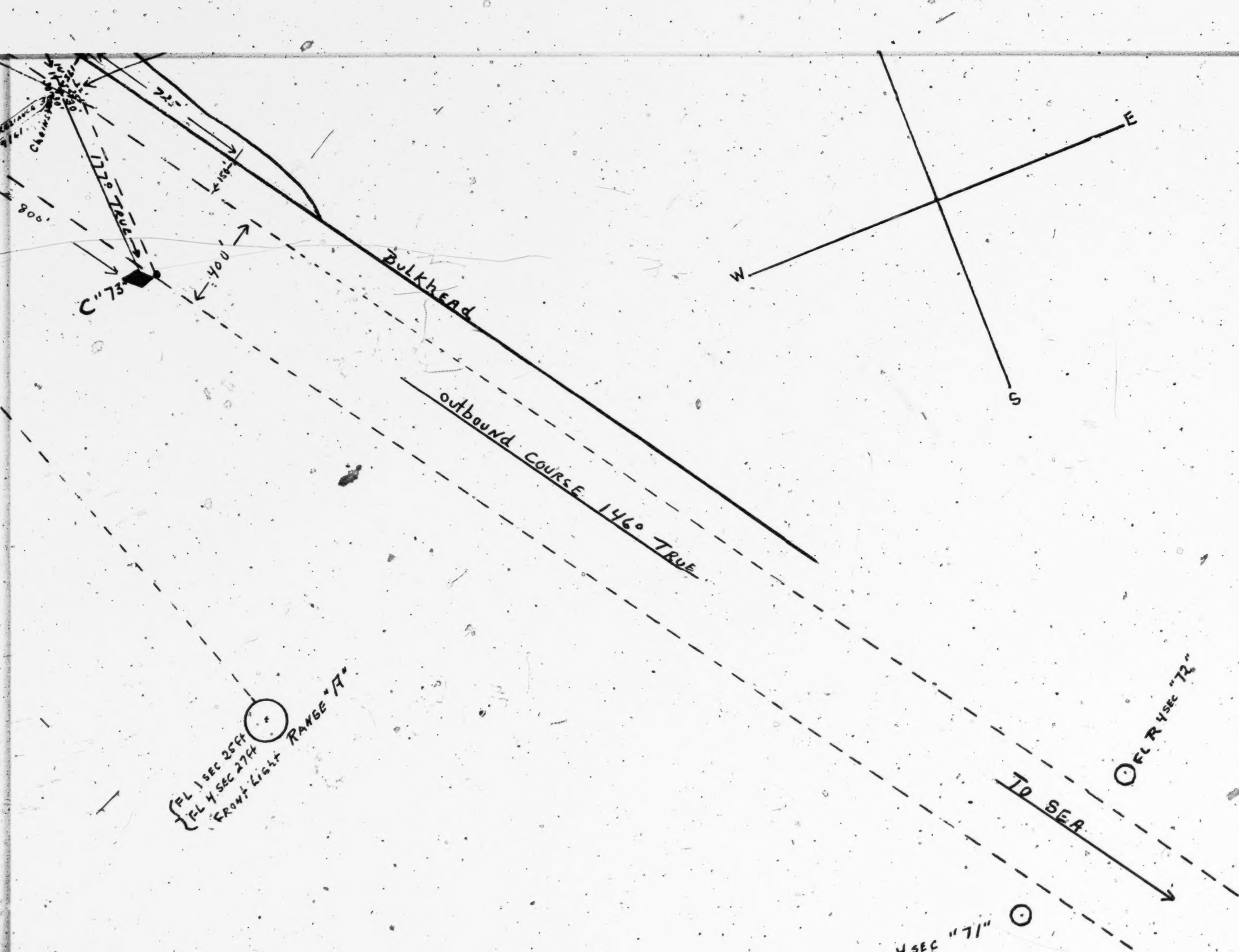
The "Union Reliance" Traveled 2400' from Turn at "76" To site of Collision, so the Steering Gear was Functioning, otherwise the ship Could not have been so far down the Channel

# APPENDIX I

Site of "UNION RELIANCE" - "BEREAN" COLLISION 11/7/61

| | | | |
|---|---|---|---|
| DRAWN H.B.L. | SCALE | REVISIONS | DATE |
| CHECKED | 1" = 400' | | 11-18-61 |
| APPROVED | | | |
| DATE | | | |
| TITLE 9th Fl. Landrin Marine Survey | | NO. | |




225°
154°
172° TRUE
800'
400'
C "73"
Bulkhead
outbound COURSE 146° TRUE
W
E
S
FL 1 SEC 25Ft
FL 4 SEC 27Ft
FRONT LIGHT
RANGE "A"
FL R 4SEC "72"
TO SEA
4 SEC "71"

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NO. 934

IN THE

# Supreme Court of the United States

October Term, 1966

LAN JING-CHAU, ET AL., *Petitioners*

-versus-

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

## PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

NEWTON B. SCHWARTZ
*Counsel for Petitioners*
500 Branard at Garrott
Houston, Texas

*Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002*

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| 1. The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court, namely | |
| (a) That the manufacturer-shipper and the carrier, with knowledge of the dangerous properties of a chemical, have no duty to comply with the standard of care required for the stowage and transportation in bulk of chemicals which have such dangerous properties, required explicitly and in clear language by one part of the Coast Guard regulations made pursuant to the statute, but are shielded from liability for the deaths and injuries of innocent third persons because they complied with a lesser standard of care allowed in another part of the regulations by the classification (and erroneously so classified the undisputed evidence established) of the named chemical. | 18 |
| (b) That a manufacturer-shipper in bulk of a lethally poisonous, inflammable chemical has no greater duty toward the public than to warn the carrier of the chemical's properties. | 19 |

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NO._____

IN THE

# Supreme Court of the United States

October Term, 1966

LAN JING-CHAU, ET AL., *Petitioners*

-versus-

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals For the Fifth Circuit**

*To The Honorable The Chief Justice And the Associate Justices Of The Supreme Court Of The United States:*

Petitioners Lan Jing-Chau, Et Al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on July 27, 1966.

## OPINIONS BELOW

The opinion of the Court of Appeals (Kilkenny, District Judge of the District Court of Oregon, sitting by designation) is reported at 364 F.2d 769 and 1966 A.M.C. 1653. It is printed in the Appendix.

The opinion of the District Court (Connally, D. J.) is reported at 222 F.Supp. 874 and 1965 A.M.C. 901. It is printed in the Appendix.

The opinion of the District Court when it granted American Cyanamid's motion to dismiss the libels against it is not reported but appears at R. 3454-3455. It is printed in the Appendix at page 86.

## JURISDICTION

The original judgment of the Court of Appeals was entered on July 27, 1966. On August 15, 1966, a fifteen-day extension of time for the filing of petitioners' motions for rehearing was granted by the Court of Appeals. Petitioners' motion for rehearing was filed August 17, 1966, and denied by the Court's order made on October 7, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1.

A manufacturer of a chemical which is not only inflammable and explosive but also lethally poisonous in extremely minute quantities contracts with a ship operator for transportation of the deadly substance, of many tons on a number of voyages. This manufacturer-shipper does not require the carrier to comply with statutory nor industrial standards of care for stowage and carriage of such a lethal chemical, and on the voyage in question approves as fit for carriage the very tank where the chemicals released by a collision of ships were stowed.

Can the manufacturer-shipper be rightfully and lawfully freed from all the direct consequences of release of tons of the lethal chemical stowed on a vessel in flagrant

disregard of applicable regulations made pursuant to statute and customarily-followed industrial standards?

2.

As a direct result of stowage of a lethally poisonous, inflammable, and explosive chemical in a wing tank (i.e., a tank whose side was also the ship's side) in the farthest forward part of the ship, when the ship was in collision with another ship on inland waters tons of the deadly chemical escaped, caught fire, and caused the deaths of twelve persons on the other vessel and serious personal injury to others (as well as great property loss).

Can the manufacturer-shipper and the carrier of the deadly chemical escape liability on the ground that a particular Coast Guard regulation (erroneously) classified the lethal chemical as an "Inflammable Liquid", so that this Coast Guard requirement for carriage in bulk of a liquid inflammable but not poisonous was complied with by the stowage, when the manufacturer-shipper and carrier and the ship's officers who made the stowage all knew that the chemical in addition to being inflammable was also a deadly poison, and the ship's stowage and carriage in bulk of an inflammable liquid that was also poisonous was both unlawful by Coast Guard regulation made pursuant to statute and flagrantly negligent by industrial standards customarily employed in the carriage in bulk of such dangerous chemicals?

3.

Has a manufacturer which is also the contract-shipper of tons of a deadly chemical in bulk only the duty to warn the carrier of the chemical's dangerous properties ("propensities"), as held by the Courts below, or has it the duty in accordance with the public policy clearly set

forth in the statute and regulations to require that the chemical is transported with care commensurate with the risk?

4.

Can a shipper and its contract carrier completely escape liability for the flagrantly negligent carriage of a lethally dangerous cargo, where such carriage directly cause death and serious injuries to innocent third persons, on the ground that the collision of ships which brought into active play their continuing negligence was the fault of the non-carrying vessel?

5.

Can a manufacturer-shipper and the carrier of a chemical which in addition to being inflammable and explosive is lethally poisonous escape all liability for deaths and personal injuries directly caused by the chemical's flagrantly negligent stowage except for those deaths and injuries which can be exactly proved were caused only by the *poisonous* properties of the lethal chemical, so that the manufacturer-shipper and carrier escape liability for deaths and personal injuries caused by the *inflammable* properties of the lethal chemical?

## STATUTES AND REGULATIONS INVOLVED

*46 U.S.C. § 170*

**Regulation of carriage of explosives or other dangerous articles on vessels—Vessel defined**

* * *

**"Transportation, etc., of other explosives or other dangerous articles; exceptions**

"(6) . . . .

"(b) This subsection shall not apply to—

* * *

"(vi) inflammable or combustible liquid cargo in bulk: Provided, however, That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title."

**"Regulations for protection against hazards created by explosives or other dangerous articles**

"(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)-(5) or (6) of this section apply—

"(a) The Commandant of the Coast Guard shall . . . also establish regulations with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessels; . . . .

"(b) The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall, insofar as applicable to them, resepectively, be binding upon shippers and the owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances: . . .

*46 U.S.C. § 391(a)*

**Vessels having on board inflammable or combustible liquid cargo in bulk**

"(1) Vessels included

"All vessels . . . that shall have on board any inflammable or combustible liquid cargo in bulk . . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: . . ."

"(2) Rules and regulations for handling liquid cargo

"In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary . . . with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; . . ."

* * *

"(4) Certificate of inspection and permit required; time of indorsing permit; inspection; duration of permit; vessels of foreign nations; permit for prohibited materials

"No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations established hereunder, have on board such liquid cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes and until a permit has been endorsed on such certificate of inspection by the Coast Guard, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations established hereunder . . ."

### *Coast Guard Regulations*

**PART 39—Inflammable or Combustible Liquids Having Lethal Characteristics**

*46 C.F.R. § 39.01-1*

"Scope of regulations—TB/ALL.

"(a) The regulations in this part contain requirements for the transportation of inflammable or combustible liquids having lethal characteristics and defined as Class 'B' or 'C' poisons in §§ 146.25-10 and 146.25-

15 of Part 146 of Subchapter N (Explosives or Other Dangerous Articles on Board Vessels) of this chapter. The regulations covering the transportation in portable tanks of inflammable or combustible liquids having lethal characteristics defined as Class 'B' or 'C' poisons are contained in Part 146 of Subchapter N (Explosives or Other Dangerous Articles on Board Vessels) of this chapter."

*46 C.F.R. § 39.05-1*

"Design, construction, and arrangement—TB/ALL.

"(a) Cargo having a Reid vapor pressure not exceeding 14 pounds per square inch may be transported in tanks, cylindrical or rectangular, independent of the vessel's hull structure, or in tanks built integral with the vessel's hull and completely separated from the shell of the vessel by means of wing tanks, cofferdams, double bottoms or similar voids."

**PART 146—Transportation or Storage of Explosives or Other Dangerous Articles or Substances, and Combustible Liquids On Board Vessels**

*46 C.F.R. § 146.01-1*

"Purpose of regulations.

"The purpose of the regulations in this subchapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States . . ."

*46 C.F.R. § 146.02-5*

"Compliance.

"The applicable provisions of the regulations in this part shall be observed by:

"(a) All vessels, domestic or foreign, subject to the regulations in this part, and the owners, charterers, agents, masters or persons in charge of such vessels;

* * *

"(c) All shippers, their agents or other persons offering explosives or other dangerous articles or substances, and combustible liquids for transportation on board vessels;

"(d) All persons engaged in the acceptance, handling, stowage, storage or transportation of explosives or other dangerous articles or substances, and combustible liquids on board vessels;

"(e) All shippers or carriers of explosives or other dangerous articles or substances, and combustible liquids shall instruct their employees relative to the provisions of the regulations in this part."

*46 C.F.R. § 146.03-8*

"Dangerous articles defined.

"A dangerous article within the meaning of the regulations in this subchapter is an article falling within any of the following classifications:

Explosives.

Inflammable Liquids.

. . .

Poisons.

Hazardous Articles.

. . . .

"For definitions covering these classifications see the appropriate section within this subchapter. These are . . . 146.25-1-146.25.20. . . . Combustible Liquids are defined in § 146.26-1."

*46 C.F.R. § 146.04-5*

"List of explosives and other dangerous articles and combustible liquids:

| | *Classed* | *Label required* |
|---|---|---|
| . . . | | |
| Acrylonitrile | Inf. L* | Red |
| . . . | | |
| Hydrocyanic acid | Poison A | Poison gas" |

(*Inflammable Liquid.)

*46 C.F.R. § 146.25-5*

"Extremely dangerous poisons, Class A, poison gas label.

"Poisonous gases or liquids of such nature that a very small amount of the gas, or vapor of the liquid, mixed with air is dangerous to life. This class includes the following:

. . .

Hydrocyanic acid.[1]

. . .

1. Dilute solutions of hydrocyanic acid of not exceeding 5 percent strength are classed as poisonous articles, Class B."

*46 C.F.R. § 146.25-10*

"Less dangerous poisons, Class B, liquids and solids, poison label.

"(a) Poisonous liquids or solids (including pastes and semi-solids), other than Class A, C, or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation, or which, in the absence of adequate data on human toxicity, are presumed to be toxic to man because they fall within

any one of the following categories when tested on laboratory animals:

"(1) *Oral toxicity.* Those which produce death within 48 hours in half or more than half of a group of 10 or more white laboratory rats weighing 200 to 300 grams at a single dose of 50 milligrams or less per kilogram of body weight, when administered orally.

"(2) *Toxicity on inhalation.* Those which produce death within 48 hours in half or more than half a group of 10 or more white laboratory rats weighing 200 to 300 grams, when inhaled continuously for a period of 1 hour or less at a concentration of 2 milligrams or less per liter of vapor, mist, or dust, provided such concentration is likely to be encountered by man when the chemical product is used in any reasonable foreseeable manner.

"(3) *Toxicity by skin absorption.* Those which produce death within 48 hours in half or more than half of a group of 10 or more rabbits tested at a dosage of 200 milligrams or less per kilogram body weight, when administered by continuous contact with the bare skin for 24 hours or less.

"(b) The foregoing categories shall not apply if the physical characteristics or the probable hazards to humans as shown by experience indicate that the substances will not cause serious sickness or death. Neither the display of danger or warning labels pertaining to use nor the toxicity tests set forth above shall prejudice or prohibit the exemption of any substances from the provisions of the regulations in this part."

## STATEMENT OF THE CASE

Petitioners are the personal representatives of all the officers and seamen who lost their lives while members of the crew of the M/V UNION RELIANCE, and the captain and other crew members who suffered burns and per-

sonal injuries but who survived, a collision between their ship and the M/V BEREAN.

The ships collided near midnight of November 7, 1961, in inland waters of the United States, in the Houston Ship Channel. The BEREAN was carrying in her farthest tanks forward (her four No. 1 tanks) fourteen hundred tons in bulk of Cyanamid's lethal chemical acrylonitrile. The BEREAN'S port No. 1 wing-tank (whose port side was also the port side of the ship), and only this one cargo tank was ruptured by the collision, and the 226 tons of the chemical in that tank were released. It caught fire, and the fire spread over the UNION RELIANCE and the water around it. From the chemical and/or its deadly fumes, fire, and/or drowning the American pilot and eleven members of the crew died, and others were seriously burned.

The collision occurred on the eastern side of that channel, so near to Buoy 73 that after collision that buoy was close under the stern of the BEREAN as it lay locked to the bow of the UNION RELIANCE at its own port bow, which was hard aground on the eastern slope of the channel. R. 4992, 5027.

For a half-mile paralleling the eastern side of this channel above and below where the ships collided there is an island which was made by the land removed when the channel was dredged out of the shallow bay. This island is at no place more than 200 feet from the deep bottom width of the channel.

Not a single one of the five crew members who died in the waters of the bay reached the safety of this island. The evidence showed at least two of these, and probably all, jumped from the UNION RELIANCE on the island side of the vessel.

The owners of the BEREAN had for some time before entering into a new contract with American Cyanamid Co. transported large quantities in bulk of Cyanamid's lethal chemical acrylonitrile from Cyanamid's Gulf plant to its plant in Holland.

When the new contract was being negotiated, the representatives of the BEREAN owners informed Cyanamid's negotiator they were familiar with the properties of acrylonitrile. They had carried considerable amounts of acrylonitrile in bulk for Cyanamid on others of their vessels before this. Nevertheless they were given a Cyanamid pamphlet which described in detail the dangerous properties of acrylonitrile and the extreme care required to handle it: In one table its properties were compared to well-known poisons and inflammable-explosive substances, and in detail with pictures it described how its handling required special gas masks, cover-alls, gloves, and other equipment. It warned that any spills or leakages must be dealt with immediately, and described how persons who swallowed, breathed, or came in skin contact with the chemical must be treated.

To carry the acrylonitrile cargo on this voyage the owners had assigned the BEREAN. It was less than a year old and had been built especially to carry chemicals in bulk.

The cargo was loaded at Cyanamid's Baton Rouge plant. There the ship's tanks were inspected by Cyanamid's employees before loading. While other tanks, protected by wing tanks, were available had their use been desired, the cargo was loaded in the forward four No. 1 tanks, which included the tank which was ruptured by the collision and whose side was the port side of the ship, the port No. 1 wing tank.

The carpenter of the UNION RELIANCE was on the forecastlehead acting as lookout and tending the anchors when the ships approached to pass, and when the UNION RELIANCE sheered toward the east side of the channel the Chief Officer and boatswain were summoned and ran to the anchors.

Just after the ships collided fire sprang up on the forecastlehead of the UNION RELIANCE, and smoke and fumes and flame immediately spread aft and engulfed the forward decks of the vessel and the bridge structures, and then spread over the after parts of the vessel. Fire was on the water around the bows of the vessel and particularly on the east side of the channel.

To escape the choking fumes and flames on the bridge, the captain jumped from the bridge into the water on the vessel's starboard side, where there was little or no fire, and where he was picked up. Later that night at the hospital it was found he had severe burns on both hands and his face.

The badly charred bodies of the chief officer and carpenter were found huddled together about fifteen feet behind the anchor windlass. The boatswain ran from the forecastlehead right after the collision shouting "fight the fire." He jumped from the after deck over the port side (the side next to the island) along with others.

The body of the boatswain and of four other members of the crew were picked out of Galveston Bay waters about ten days later. (R. 4670-4673) Two bodies were those of one of the two helmsmen and the radio operator, both of whom had been on the bridge at the time of the collision.

Almost completely consumed by flames, the remains of the pilot's body were found in a passageway leading down from the bridge. The body of the other of the two helmsmen who had been on the bridge was found on the starboard boat deck near the foot of the ladder leading to the pilot house one deck above, and this body showed only slight evidence of burns. The body of the Second Officer was found in a washroom, with little or no evidence of fire on the body or in the room. One man's body was picked up amidships by crew members fighting the fire and laid on the poop deck aft; it showed practically no evidence of burns.

Many of the crew took shelter from the first fumes and flames in spaces aft, but they had to rush out when breathing became difficult (and helped to extinguish the fire aft of amidships). At least one of the engine room crew that came up amidships to fight the fire was overcome by smoke, fumes or flames and became unconscious and was carried ashore. One badly-burned man later died in the hospital.

In all the pilot and eleven members of the crew lost their lives, and the captain and others suffered burns of varying degrees.

There was testimony that poisoning by acrylonitrile was exactly like that from hydrocyanide, both causing death within a very short time, but that acrylonitrile was more deadly in some respects since it would cause death from swallowing and skin contact in addition to death by inhalation. Tests for poisoning were the same for both chemicals, the principal sign being the bright red color of the blood, caused by the chemical's reduction of oxygen in the blood—not detectible except shortly after death. R. 2079.

A toxicologist who was engaged by Cyanamid to make tests for the toxicity of acrylonitrile referred to in its pamphlet testified that acrylonitrile was far more deadly than the 5 per cent solution of hydrocyanic acid (twenty times in fact) classed by the Coast Guard as a Class B poison, R. 2055, and was by virtue of its absorptive and ingestive deadliness as toxic as hydrocyanide acid classed as a Class A poison in the Coast Guard tables, and that it was well-known to medical science that it was toxic to man, proved by the deaths of two children killed by small quantities of acrylonitrile used as an insecticide in a room in one case and as a hair disinfectant in the other, even though the Cyanamid pamphlet, Piaget Cyanamid Exhibit 7, said there were no known cases of industrial deaths. R. 2053-2054.

Its extreme toxicity was emphasized by the fact, so stated in the pamphlet, that it had to be handled in a closed system, i.e., where the vapors could not escape. R. 2049.

There was evidence, also undisputed, from two well-qualified witnesses that other manufacturer-shippers of such chemicals required of carriers stowage away from the ships' hulls, and that newly-built vessels (such as here was the BEREAN) for bulk chemical transportation had cofferdam spaces between the cargo tanks and the vessels' hulls.

In dismissing the libels filed against it on the motion of Cyanamid, the trial Court found that both the BEREAN's owners and Cyanamid knew "the dangerous propensities" of the chemicals. R. 3454, printed in the Appendix page 86. The evidence was undisputed that the ship's officers also knew that the chemicals were extremely dangerous: (a) the BEREAN second officer testified before

the Coast Guard that when he ran down to drop the anchors and stopped on deck and did not continue forward he was conscious of the danger from the cargo forward, (b) the BEREAN captain testified before the Coast Guard he would have advised against dropping the anchors because of the danger of dropping anchors with this cargo carried forward, and (c) the BEREAN radioed the Coast Guard for help after the collision and informed it it was carrying dangerous chemicals.

## Jurisdiction of the District Court

The District Court had jurisdiction of the controversies because they arose out of a collision of vessels in navigable waters, thus within its admiralty jurisdiction. United States Constitution, Article 3, Section 2, Clause 1; 28 U.S.C. § 1333. Limitation of liability was sought, and it had jurisdiction also therefore under the Limitation of Liability Act, 46 U.S.C. §§ 183, *et seq.*

## Decision of the District Court

The trial Court granted Cyanamid's motion to dismiss the libels brought against it when petitioners had rested, but it denied like motions of the BEREAN owners. It gave as the ground for its decision, R. 3435-3455, printed in the Appendix at page 86, that the only duty of "a manufacturer and shipper of an inherently dangerous commodity" is "to warn and advise others who may come in contact with it of its dangerous propensities". The evidence showed clearly this had been done, that the carrier was fully advised of the dangerous propensities of the cargo, and any fault in the stowage and carriage of the cargo in certain tanks of the BEREAN would be the fault of the vessel and its owner and not of the shipper.

Later when the decision was given, the Court held the collision was caused by the sole fault of the UNION RELIANCE, her crew and owners. Recovery was allowed to the BEREAN owners, Cyanamid, the United States, and petitioners here (with some percentage reductions to the latter for personal faults). It held "as result of the fire caused by the collision" the pilot and the (named) crew members were killed and injured.

## Decision of the Court of Appeals

The trial Court's decision was affirmed on all issues by a majority of the Court of Appeals.

With respect to the petitioners' contention that the BEREAN and her owners and Cyanamid were at fault for the skin-tank, forward, stowage of the dangerous chemical, it was held that the specific Coast Guard classification of acrylonitrile permitted stowage in tanks next to the ship's skin, and that the BEREAN and her owners lawfully were not required to inquire into the validity of the Coast Guard classification and were entitled to stow in accordance with those requirements: that the Cyanamid pamphlet had nothing to require a different result.

No comment was made on the trial Court's finding (when Cyanamid's motion for dismissal was granted) that Cyanamid, the BEREAN, and the BEREAN owners were fully aware of the dangerous propensities of the cargo.

On the fault of Cyanamid the majority of the Court "assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, contractual or otherwise", but on examining the evidence found it supported a finding that the persons were killed and injured by fire and any other finding would have been speculative. The

majority opinion on this point concluded that the proximate cause of the deaths and personal injuries was none other than the fault of the UNION RELIANCE in colliding with the BEREAN.

Judge Brown, dissenting, would have held that while the BEREAN could lawfully accept a faulty Coast Guard classification Cyanamid could not, as the manufacturer and shipper of a chemical it knows does and can kill, and while it did not have the liability of an insurer it certainly had the liabilities now associated with products liability, and he would have reversed to determine the damages caused by Cyanamid.

## REASONS FOR GRANTING THE WRIT

**1. The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court, namely**

**(a) That the manufacturer-shipper and the carrier, with knowledge of the dangerous properties of a chemical, have no duty to comply with the standard of care required for the stowage and transportation in bulk of chemicals which have such dangerous properties, required explicitly and in clear language by one part of the Coast Guard regulations made pursuant to the statute, but are shielded from liability for the deaths and injuries of innocent third persons because they complied with a lesser standard of care allowed in another part of the regulations by the classification (and erroneously so classified the undisputed evidence established) of the named chemical.**

**(b) That a manufacturer-shipper in bulk of a lethally poisonous, inflammable chemical has no greater duty toward the public than to warn the carrier of the chemical's properties.**

Petitioners here with respect most earnestly urge that, as the dissenting Court of Appeals judge has pointed out, the Courts below have wholly failed to decide this case in accordance with the law which governs the duty of all those who handle lethally dangerous cargoes transported within the territorial limits of the United States: The trial Court does not even refer to the governing statutes, and the Court of Appeals, while recognizing the public policy embodied in the statute to require for the protection of life and property *all* who handle dangerous liquids to exercise the greatest of care, set forth clearly in 46 U.S.C. § 170, does not even refer to the applicable statute which governs *bulk* shipments of inflammable, combustible liquids, 46 U.S.C. § 391a.

Directly contrary to the express language of those statutes, and to the Coast Guard regulation imposing on *all* persons who handle such dangerous cargoes in commerce where the public is endangered the duty of compliance, 46 C.F.R. § 146.02-5 (not referred to by either Court), the trial Court decides that the manufacturer-shipper's *only* duty is to warn the carrier of the dangerous propensities of the cargo, and this decision is affirmed in slightly different language by the Court of Appeals.

Further, in the face of the *undisputed* evidence that this inflammable liquid was lethally dangerous (by the express language of 46 C.F.R. § 146.25-10(a) thus placed in the category of a Class B poison liquid which lawfully can be transported in bulk on ships only in center-line

tanks which are away from the ship's hull protected either by wing tanks or cofferdam spaces), evidence so clear that the trial Court found that Cyanamid and the BEREAN and the BEREAN's owners all knew of its dangerous propensities", it is held that the BEREAN is protected from liability by stowage complying with an undisputedly erroneous Coast Guard classification of the chemical as an inflammable liquid only!

It is respectfully submitted such holdings are plainly wrong, inconsistent with the rationale if not directly in conflict with decisions of this Court and opposed to the present law governing the handling of dangerous products.

In *Dalehite v. United States*, 346 U.S. 15, at 53, 73 S.Ct. 956 at 977 (1953), while decided on other grounds, the governing law is correctly put in the dissenting opinion, as follows:

> ". . . We believe that whatever the source to which we look for the law of this case, if the source is as modern as the case itself, it supports the exaction of a higher degree of care than possibly can be found to have been exercised here.
>
> "We believe it is the better view that whoever puts into circulation in commerce a product that is known or even suspected of being potentially inflammable or explosive is under an obligation to know his own product and to ascertain what forces he is turning loose. If, as often will be the case, a dangerous product is also a useful one, he is under a strict duty to follow each step of its distribution with warning of its dangers and with information and directions to keep those dangers at a minimum."

Years ago, before the growth in use of dangerous products, this Court held in *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482 at 484 (1916), that

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied . . ."

A like holding is made in *Shields v. Atlantic Coast Line Railroad Company*, 350 U.S. 318, 76 S.Ct. 386 (1956).

While the carrier was freed because of lack of knowledge of the dangerous properties of the cargo in *The Nitro-Glycerine Case (Parrott v. Wells)*, 15 Wall. (82 U.S.) 524, 21 L.Ed. 206 (1873), it was impliedly held, by approval of the decision in *Pierce v. Winsor*, Fed. Cas. No. 11,150 (Mass. Cir. 1861), that the shipper with knowledge of the propensities had he been a party would have been held liable. Can it be doubted that had the carrier been possessed there as here of knowledge of the dangerous propensities of the cargo it would not have been freed from liability?

In *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 29 S.Ct. 270 at 276 (1908), it was stated that a seller of a dangerous product selling it contrary to statutory regulations would be liable even if it had warned the receiver.

Courts of Appeal have held that statutory regulations often express a standard of *minimum* care. The Black Tom explosion cases, *Lehigh Valley R. Co. v. Allied Machinery Company of America*, 271 F. 900 (2 Cir. 1921); *Lehigh Valley Railroad Co. v. Lysaght, Ltd.*, 271 F. 906 (2 Cir. 1921); *Fidelity & Deposit Company of Maryland v. Lehigh Valley R. Co.*, 275 F. 922 (3 Cir. 1921). Please see also *Walker v. Harris*, 335 F.2d 185 (5 Cir. 1964) and *Schlichter v. Port Arthur Towing Co.*, 288 F.2d 801 (5 Cir. 1961).

Where as here the public policy made manifest by the clear language of the statute and of lawful regulations is to impose on *all* the higher standard of care, and both shipper and carrier had full knowledge which made their conduct *subject to this standard*, how consonantly with these cases can it be held their duties were fulfilled by complying with a *lower* standard also but erroneously provided for by the regulations?

**2. The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeals on the same matter, namely, that the manufacturer-shipper and the carrier of cargoes lethally dangerous do not have the duty to follow an industry's highest standards of care in the stowage and transportation of lethally dangerous chemicals.**

Here there was undisputed testimony that other manufacturer-shippers of like dangerous chemicals and carriers made it a practice to transport such chemicals away from the hull, in inner tanks or tanks protected by cofferdams. Nevertheless here the lethal chemicals were carried next to the skin of the ship.

In *The T. J. Hooper*, 60 F.2d 737 (2 Cir. 1932), and *Petition of Oskar Tiedemann & Co.*, 289 F.2d 237 (3 Cir. 1961), it has been squarely held a vessel owner must comply with the industry's highest standards of care, especially where the standard involves the safety of third persons. In a case recently decided by the Ninth Circuit, the case of *Simpson Timber Co. and Grace Line, Inc. v. Parks*, No. 19,673 on the Court's docket, the decision reported in 1966 A.M.C. 1081 being withdrawn and reversed on rehearing *en banc*, both the majority and the dissenting judges agreed that the manufacturer-shipper and the carrier

must conform to the industry's higher standards of care where dangerous substances are being transported.

The decision of the Courts below are in direct conflict with these decisions, and indeed as the dissenting Judge Brown points out here lower the generally accepted standards of care required in the handling of dangerous products.

**3. The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeals on the same matter, namely, that the manufacturer-shipper and the carrier are not liable for all consequences of their failure to transport a lethally dangerous chemical in accordance with the care imposed by statute and used by others in the industry but are insulated (a) completely from all liability to innocent third persons by negligence of a person who brought into active play the manufacturer-shipper-carriers' continuing negligence and (b) liability for deaths and personal injuries except for those that could be clearly proved were caused by only one property of the lethal chemical.**

Petitioners here respectfully urge that the decision of the Court of Appeals on *causation* is also plainly wrong, and in conflict with carefully determined cases on the same matters by other Courts of Appeal.

The evidence here establishes that only immediately after a death (or lesser asphyxiation) can it be exactly determined that the injury was due to acrylonitrile *poisoning*: The poison turns the blood bright red by the elimination of oxygen. In persons replenishing their oxygen by breathing the poison's effects are of course not so visible, and dead bodies tell no such tales, particularly where burned beyond

recognition, or dead for several days, or long immersed in water as these here were.

How rightfully can a wrongdoer be freed from liability where by his wrong the *direct* evidence is destroyed and proof can only be made by inductive reasoning, called below "speculative"?

And how lawfully, in the teeth of the statute which emphatically states its purpose is to protect against "the hazards to *health*, life, limb, or *property*" can it be held that where as a consequence of flagrant negligence deaths and *permanent* personal injuries are caused by *fire* no liability exists unless the death or injury is proved to have resulted from the *poisonous* property of the chemical?

Who can say that had the person not been first overcome by the *poisonous* property of the chemical he would have been able to escape death from fire, or by drowning? Who can say that a death was not the joint result of both the poisonous and inflammable properties of a chemical having both properties combined in the one substance?

And how, consonant with the cases holding that where the continuing negligence is concurrent with activating negligence of a third party as undoubtedly is the case here the third person's negligence is not a *superseding* cause, can the decisions below rightfully stand?

That such activating negligence is *not* lawfully *superseding* negligence but only intervening negligence is carefully discussed and decided in *United States v. Marshall*, 230 F.2d 183 (9 Cir. 1956).

In *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), a case like the instant one where a statute (there on a District of Columbia ordinance) was enacted to prevent injury to other persons which could result from the negli-

gence of a third person, it was held such third person's negligence concurring with the already-present statutorily-forbidden negligence did not supersede and render not causative the conduct of the person whose actions were contrary to the statute.

It is respectfully submitted the decision of the Court of Appeals is directly in conflict with these two decisions.

Petitioners finally here respectfully submit that the rationale of this Court's decision in *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394 (1958), reversing the decision reported at 235 F.2d 618, 1956 A.M.C. 1803 (3 Cir. 1956), which had affirmed the District Court's decision at 141 F. Supp. 582, 1956 A.M.C. 383 (D.C. Pa. 1956), is also contrary to the decision below: There it was held that violation of the statute made the wrongdoer liable to a person of the class the statute was designed to protect, under circumstances it is submitted were far less clearly within the reach of the statute than here, even though there was activating negligence of a third person.

## CONCLUSION

A Writ of Certiorari should be granted to review the decision of the Court of Appeals herein.

Respectfully submitted,

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APPENDIX A

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 21367

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CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S.A., ET AL.,

Appellants,

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,

Appellees.

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*Appeal from the United States District Court for the Southern District of Texas.*

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(July 27, 1966.)

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Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

KILKENNY, District Judge: This is the story of another maritime tragedy resulting in heavy loss of life, severe personal injuries and property damage.

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* Of the District Court of Oregon, sitting by designation.

On November 7, 1961, about 11:00 P.M. the Chinese Ship M/V UNION RELIANCE (RELIANCE), was proceeding outbound, and the Norwegian Ship M/V BEREAN (BEREAN), which was inbound, collided on the east side of the Houston Ship Channel (Channel). The night was clear, the visibility good, with a northerly wind of approximately eight miles per hour. The ships caught fire, the fire aboard the BEREAN was extinguished within a matter of hours, while the RELIANCE remained ablaze, blocking the channel until November 10th when it was towed to and anchored in Galveston Harbor by the United States Corps of Engineers.

## THE LITIGATION

After the towage, the United States filed a libel *in rem* against the RELIANCE, seeking the immediate sale of the vessel, the recovery of expenses incurred in removing the vessel from the Channel and in safe-guarding her while at anchorage. China Union Lines, Ltd. (China Union), owner of the RELIANCE, filed a petition for exoneration, or limitation of liability, and obtained the customary order prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding. In the petition, China Union elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. The court appointed a salvage master and authorized him to undertake the steps necessary to extinguish the fire in the vessel's holds and bring her to port to discharge the remaining cargo, preparatory to sale.

In other proceedings, in the same court, China Union filed its libel against the BEREAN. A. O. Andersen & Co. (Andersen), the owner of BEREAN, appeared, claimed the vessel and answered in cross-libel against China Union.

Mitsubishi International Corporation, et al, (Mitsubishi), the owners and underwriters of the lost and damaged cargo aboard the RELIANCE, filed a libel against BEREAN and her owner. Likewise, American Cyanamid Company (Cyanamid), the owner of the only cargo lost aboard the BEREAN filed its libel against the RELIANCE. The Consul General of the Republic of China (Consul General), sought recovery for the injuries to, and deaths of, the officers and members of the crew (Lan Jing-Chau) of the RELIANCE against both vessels. Lucy Duncan (Duncan), as widow, executrix and sole beneficiary of Captain Duncan, channel pilot, also killed as a result of the collision, sought recovery against RELIANCE and her owners.

Separate libels were filed directly against Cyanamid, as owner of the BEREAN cargo, by China Union; the owners and underwriters of the cargo aboard the RELIANCE, and various other parties. These libels were filed on the theory that the acrylonitrile carried by the BEREAN, was of such a dangerous nature and propensity as to render the shipowner liable to said parties.

This complexity of libels, with its jungle of issues, was wisely consolidated by the trial judge (judge). Prior to trial, and after hearing, the judge directed payment of certain salvage claims and deferred action on the remainder of such claims pending a decision on the issues of liability.

After trial, and the entry of detailed findings and conclusions, the judge entered an interlocutory decree directing, among other things, that:

(1) the petition of China Union for exoneration from, or limitation of, liability be denied;

(2) reimbursement be made to the trustee, out of

funds in the Registry of the Court, for the trustee's reasonable expenses, including trustee and attorney fees;

(3) payment be made of the claim of the United States from funds remaining in the Registry of the Court in the sum of $27,219.38, with interest;

(4) China Union recover nothing from the cargo of the RELIANCE as general average;

(5) the order theretofore entered enjoining prosecution of litigation against China Union on any claim growing out of the collision be vacated;

(6) China Union recover nothing against respondent Andersen or the BEREAN, that its libel be dismissed with costs and that Andersen, as cross-libelant, recover from RELIANCE and cross-respondent, China Union the damages sustained by it in consequence of the casualty;

(7) Mitsubishi, and other such libelants, the owners of parcels of cargo on the RELIANCE, recover nothing against the BEREAN or her owner Andersen or Cyanamid, and that such libel be dismissed with costs;

(8) Cyanamid recover from the RELIANCE and her owner China Union the damages sustained in consequence of the casualty, and that the cross-libel by China Union against Cyanamid be dismissed with costs, together with any other intervening libels or cross-libels against that company be dismissed;

(9) the Consul General, representing the next of kin of the dead Chinese seamen and those that were injured, recover nothing against BEREAN or Andersen and that the libel be dismissed;

(10) the representative of the deceased and injured crewmen recover from the RELIANCE and her owner

China Union, all damages sustained by each of them, less one 15% reduction for contributory fault.

(11) Lucy Duncan, the surviving wife of Captain D. O. Duncan, recover from the RELIANCE and her owner China Union, such damages as sustained by reason of the death of her husband.

(12) Armement Deppe, owner of the SS LUXEMBOURG, recover nothing from the BEREAN or her owners Andersen & Co.

China, Mitsubishi, the Consul General of the Republic of China, and Armement Deppe, S.A. appeal

## FINDINGS

The detailed findings and conclusions of the judge occupy twenty-five pages of the record. Putting aside certain background material and formalities of no particular significance on this appeal, the judge, after a trial of approximately one month, found that the following facts, with others to be later discussed, were supported by substantial evidence.

## THE VESSELS

The RELIANCE was a steel motor ship, built in the United States in 1940, approximately 496 feet in length and designed for the carriage of dry cargo. The ship's engines were designed to give approximately 240 revolutions per minute which, with the existing gear ratio should give approximately 80 revolutions per minute to the shaft. However, by reason of age, wear and poor maintenance, the engines were not capable of producing this efficiency. To change the direction in which the power is imparted to the propeller shaft, it was necessary to stop the engines by

cutting off the fuel supply, then change the cam setting and restart the engines. The design permitted and, for that matter, contemplated one pair of engines to be kept running ahead and the other pair to be kept running astern at all times while the vessel was in pilot waters. When desirable all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was neither a difficult nor a time consuming operation and could be accomplished by competent engine room personnel in a matter of approximately one minute. She was equipped with a hydraulic steering system, located in the steering engine room, not in the main engine room. Hydraulic rams, equipped with fluid under great pressure, actuated the rams and served to move the rudder in the desired direction. Two separate steering systems were available to force the fluid through the system and against the rams, while one was in use the other served as a stand-by. The principal unit of the steering system was a large pump powered by an electric pump utilizing a 50 h.p. electric motor. A number of auxiliary pumps and motors were available, but only a so-called "replenishing" pump was of any importance. In normal operation the hydraulic fluid escaped from the system and was collected in the sump tank, then lifted by means of the "replenishing" pump to an overhead replenishing tank from which, by gravity, it was fed back into the system for further use. This pump was powered by a small electric motor. Approximately 35 gallons of fluid was required to fill each system. While minor leaks were expected, in normal operation only small quantities of fluid should be required at quite infrequent intervals.

The BEREAN was built in Norway and delivered to her owner in April, 1961. She was 508 feet in length.

powered by one 9000 h.p. diesel engine. Her navigating bridge is in the forward part of the afterhouse, some 350 feet from the bow. Her cargo space is divided into 42 tanks, designed and equipped to carry many varieties of bulk liquids. She had been engaged in the chemical trade for several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The skin of the ship constituted the outer wall of certain of her wing tanks. These tanks were not protected by cofferdams or other protective voids.

## CARGOES AND MOVEMENTS PRECEDING THE CASUALTY

Following her purchase in April, 1961, from Greek interests, the RELIANCE sailed from Greece, through the Mediterranean to Tampa, Florida, and thence to New Orleans. There, her captain and crew had full knowledge of the fact that extensive repairs were needed in the engine room, in particular the overhaul of the engine control department. An officer of the petitioner and a marine surveyor flew from New York to New Orleans to supervise these repairs. While those repairs were underway, the main engines were opened and found badly worn and eroded. Since repairs were not readily available the old heads were re-installed. A full report was made to the owners of the work and other work which was recommended by the marine surveyor to place the engine room in proper condition. Departing New Orleans the RELIANCE proceeded to Houston, thence through the Panama Canal, thence to Japan and Taiwan, where additional engine repairs were made. There, her captain, chief engineers and others of her crew were replaced and the officers and crew who were

aboard at the time of the casualty took over. She discharged a part of her cargo at Los Angeles and there received five of the number of piston heads that were needed to properly repair her main engines. However, the heads were not installed. She arrived in Houston on November 5th, discharged part of her cargo and left the Houston dock at 6:30 P.M. November 7th. Unassisted by tugs, she proceeded outbound, with Channel pilot Duncan at her bridge. At approximately 8:30 P.M. while she was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system, which was in use at the time. The engines were stopped, the anchors were dropped and the vessel brought to rest. Both the starboard and port steering systems were disconnected. After a test had shown that the port system was operating properly, the anchors were lifted and the vessel got underway at approximately 9:00 P.M. Her crew then attempted to repair the starboard steering system. On examination, it was found that the brushholder on the electric motor which operated the starboard steering pump was out of order. The chief electrician repaired the damaged part, but did not replace the part in the engine. As a result, the starboard steering system was not thereafter in operation. Apparently the port steering system was functioning properly until she started across the channel.

On November 6, 1961, the BEREAN loaded 1400 tons of acrylonitrile in Good Hope, Louisiana. The officers of the vessel directed that the cargo be placed in the forward most cargo tanks. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. A distinguishing feature is that it gives off highly toxic fumes. The fumes, in relatively weak concentrations, will cause illness to a person exposed over a long period of time. A single exposure may

cause illness or death if there is a sufficiently high concentration of the material. The symptoms of poisoning are similar to those of cyanide. Under Coast Guard Regulations (Regulations) acrylonitrile was, at the time of the casualty, and still is, classified under Regulations as a Grade C flammable fluid, as is gasoline, benzine, naphtha and other such products. The BEREAN also carried a mixed cargo of other bulk liquids. She arrived at Galveston Bar at approximately 9:15 P.M. on November 7th. Channel pilot Lary boarded her and assumed active control of her navigation as she proceeded inbound toward Houston.

From the sea buoy to the point of collision, and beyond, the channel passes through the open waters of Galveston Bay. The channel was dredged to a depth of 36 feet and a width of 400 feet, and is relatively straight as it crosses the Bay. It was the custom and practice of most vessels, in favorable weather, to navigate this portion of the channel at "full ahead," except when passing other ships. From the sea buoy to the point of collision, pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a major portion of the time, although he was in his cabin before the emergency. He returned to his bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour. It was his duty to proceed to the bow of the ship to serve as a lookout for another hour, before returning to duty at the wheel. However, when weather and visibility were good and the vessel was proceeding routinely, it was the custom and practice for the helmsman to have a 10 to 15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose. Normally, in passing through the area being navigated by the BEREAN, it was not customary to have an anchor

watch standing by, in that there was no occasion to use an anchor to maneuver until after reaching Morgan's Point, some distance inward.

## THE COLLISION

The RELIANCE was navigating at a speed of 9-10 knots over the ground, when she made the bend at Five Mile Point. Each vessel saw the lights of the other about that time. BEREAN blew a one blast signal, which was not answered by RELIANCE. In negotiating the bend, RELIANCE navigated somewhat to her starboard side of the channel. The pilot of the BEREAN noted and commented upon this maneuver. However, the maneuver was, to them, of little significance and did not cause the vessel to sheer away from the starboard bank, nor did it result in loss of control of her steering. In making the turn the RELIANCE pilot ordered her rudder five degrees to port. The rudder responded to the movement of the wheel and the vessel started to turn to port. At this highly important point, the steering gear of the RELIANCE failed; with the frozen rudder in a five degree port position. The quartermaster was unable to move the wheel in either direction and she continued to swing under that rudder setting. Thereafter, she did not straighten her course. After her captain, pilot and quartermaster determined that the wheel would not respond, her bridge notified the engine room to reduce speed and shortly thereafter to stop. On watch was the third mate who was ordered by the captain to find the chief engineer and advise him of the rudder failure. Her engine room was directed to give full speed astern. The pilot of the RELIANCE, recognizing the imminent danger, ordered her first starboard anchor to be dropped and shortly thereafter ordered her port anchor dropped. At this point, approxi-

mately 11:00 P.M., the RELIANCE sounded three blasts on her whistle. This was the only wistle signal she sounded. Efforts to transfer the steering control on her bridge from the telemotor system to the gyro-pilot failed and she continued to swing to her port, completely out of control. Prior to the emergency the RELIANCE'S four engines had all been coupled for maximum forward speed. Under orders for full power astern, the engine room reversed one set of two engines and coupled the same to the propeller shaft to give astern power. This, however, did not control the vessel's swinging to port, with some headway and she continued to have headway until she collided with the port side of the bow of the BEREAN. The remaining two engines were never reversed and coupled to the shaft. The other findings, with reference to fault, lack of fault, privity and other issues, we shall discuss in connection with the assignments of error.

## CREDIBILITY OF WITNESSES

The judge noted that several of the principal witnesses for the petitioner were impeached in connection with subjects of great importance. He pointed to the withholding of an important report by the petitioner, which report had received the approval of the captain. The report was entirely inconsistent, in a number of important respects, with the theory advanced by the RELIANCE. He also pointed to the impeachment, on important testimony, of the chief engineers and chief electrician of the RELIANCE.

## ASSIGNMENTS OF ERROR

Putting aside, for later discussion, the claims against Cyanamid and the claim of the United States, we summarize the assignments of error in the ensuing fashion:

I. That the judge erred in exonerating the BEREAN, because the record shows that she failed to stop, blow proper signals or proceed with caution after she first recognized that there was a risk of collision.

II. That the judge erred in exonerating the BEREAN, when the record shows that she failed to proceed at a moderate rate of speed on meeting a vessel that she was to pass.

III. That the judge erred in exonerating the BEREAN, when the record shows that she failed to keep a lookout on the bow or a proper lookout on the bridge.

IV. That the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

V. That the judge erred in exonerating the BEREAN, when the record disclosed that she was unseaworthy and at fault for transporting a poisonous, explosive and flammable cargo in her forward wing tank, next to the skin of the ship.

VI. That the judge erred in denying petitioner limitation of liability under 46 U.S.C. § 183 (a), against all claims made against it.

VII. That the judge erred in holding the petitioner and RELIANCE liable for loss and damage by fire to the RELIANCE cargo, because the fire originated from the other vessel and because petitioner, as a carrier, was exempt from such liability under the Bills of Lading and by virtue of 46 U.S.C. § 1304 (2) (b), and 46 U.S.C. § 182.

## ASSIGNMENT I

I. On this assignment, appellants charge that the BEREAN violated two of the Inland Rules[1] in failing to stop, blow proper signals or proceed with caution after she first recognized, or should have recognized, that there was a risk of collision.

It is contended that the BEREAN violated Rule I, when she (1) blew a one blast signal, proposing a port-to-port passing at a time when those in charge were in doubt as to the feasibility of such a passing, and (2) turned right two or three degrees before receiving a reply to her one blast signal. Rule III was violated, say appellants, when the BEREAN failed to blow a danger signal and reverse her engines immediately upon seeing the RELIANCE in a position that might force her to sheer across the channel. Practically all of appellants' arguments on this assignment are based on an assumption that the RELIANCE, did sheer off its starboard bank and that such fact was observed, or should have been observed, by Pilot Lary of the BEREAN. The judge saw and observed the witnesses and chose to believe Lary's version of what occurred and the reasons for his action, or lack of action, at the time. While Lary observed the position of the RELIANCE when the vessels were approximately one mile apart, he had no feeling that a collision was imminent until he heard the whistles of the RELIANCE and the sound of the anchor letting, at which time he recognized an emergency and gave a full speed astern on the BEREAN'S engines and a hard right rudder to put her aground in the mud bank at his starboard side of the channel. On these issues, the judge found that each vessel saw the other when the RELIANCE was making the

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1 33 U.S.C. § 203, Rule I.
33 U.S.C. § 203, Rule III.

bend at Five Mile Point, at which time they were approximately three miles apart. The BEREAN blew a one blast signal which was not answered by the RELIANCE. In negotiating the turn the RELIANCE navigated somewhat to the starboard side of the channel. This maneuver was noted and commented upon by Lary, but he considered it of little consequence. The maneuver did not cause the RELIANCE to sheer away from the starboard bank, did not cause loss of control of steering and did not precipitate the casualty. Prior to sighting the RELIANCE, approximately three miles away, the BEREAN had been navigating at "full ahead" and making thirteen to fourteen knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to one-half and shortly thereafter to "slow ahead." It was at this time that the one blast signal was given by BEREAN. While the one blast signal was not answered, Lary fully expected to make a normal port-to-port passing. He was somewhat apprehensive after watching the RELIANCE swing to port and turned the BEREAN slightly to starboard, still expecting to negotiate the port-to-port passing. Lary's order for full speed astern on the BEREAN'S engines and a hard right rudder were put in immediate effect. At this time the vessels were approximately one-fourth of a mile apart and closing on each other. The judge found that the BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger that the BEREAN was not at fault in failing to undertake a starboard-to-starboard passing. The judge found that she had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed in which such a passing might have been accomplished in safety. These findings are fully supported by the record and, in particular, by the testimony of the Pilot Lary

and the Mate Haugen. The piercing searchlight of hindsight, so skillfully employed by counsel for appellants, may point to other maneuvers that might have been taken successfully by the BEREAN. However, both we, and the judge, must interpret the record from the viewpoint of a prudent pilot under the circumstances then and there existing. Lary's conduct must be judged with reference to the circumstances at the time and not by a cool estimate of possible danger which might be formed after the event.

It is conceded that vessels, in this channel, are required to pass port-to-port—that meeting vessels must approach each other and pass by turning to starboard two or three degrees. This is in line with a judicially recognized custom in the channel. *Royal Navy of Italy v. Standard Oil Co. of N.J.*, 27 F.2d 331 (5th Cir. 1928). The cases cited by appellants, on this assignment, simply do not support their position. For example, the decision in *THE SANDMASTER*, 105 F.2d 1009 (2d Cir. 1939),[2] dealt with a situation where the Inland Rules and a special statute were confused by the pilot; this confusion led to a collision involving three vessels. The judge there held that the narrow channel rules did not apply to a section of the East River, near Brooklyn Bridge, but that navigation in that section was governed by the East River Statute. Obviously, that decision is of no assistance. On the other hand, the case on which the lower court and BEREAN rely, *VICTORY-PLYMOTHIAN*, 168 U.S. 410 (1897), is of compelling significance. The facts in that case are almost identical with the facts in this record. A lengthy discussion of that decision is unnecessary. It is enough to say that the decision

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2 For factual statements see District Court opinion, 26 F. Supp. 64. This decision is reported **sub nom Construction Aggregates Co. v. Long Island R. Co.**

is in full and complete support of the findings and conclusions of the judge on this issue. Other cases cited by appellants, such as *RICHARD J. BARNES*, 111 F.2d 294 (2d Cir. 1940); *A. H. Bull v. United States*, 34 F.2d 614 (2d Cir. 1929); *MELROSE-SANDCRAFT*, 237 F.2d 884 (2d Cir. 1957), and others, involved crossed signals or a change of course of one of the vessels. Those cases are no more in point than the *SANDMASTER, supra.* We conclude that the findings and conclusions of the judge, on this issue, are supported by substantial evidence.

## ASSIGNMENT II

Appellants charge BEREAN with failing to proceed at a moderate rate of speed on meeting the RELIANCE, in violation of 33 C.F.R., § 207.180 (e) (3) (ii).[3] Appellants theorize that the BEREAN kept traveling at full speed ahead long subsequent to the time when, on seeing the RELIANCE in a position on the bend from which it was likely to sheer, she should have reduced her speed and reversed her engines. The judge's findings are in direct conflict with appellants' assertions. He found that the BEREAN observed the RELIANCE as she was in the turn of the channel about three miles away. Prior thereto, the BEREAN had been navigating at full ahead, or approximately 13 to 14 knots. On observing the RELIANCE coming out of the bend, the BEREAN'S speed was reduced to "one-half" and shortly thereafter to "slow ahead." At this time the BEREAN gave the one blast signal, which was not answered by the RELIANCE. True enough, the pilot and watch officer of the BEREAN observed the RELIANCE somewhat close to her

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[3] "A vessel shall reduce its speed sufficiently to prevent any damage when approaching another vessel in motion or tied up, . . . ."

starboard bank of the channel and watched her swing to port, at which time they became somewhat apprehensive. The BEREAN, at this time, turned slightly to starboard. However, it was not until the BEREAN heard the three blast signal from the RELIANCE, and heard the sound of the anchor letting go, that the pilot of the BEREAN recognized an emergency. He forthwith blew three blasts in return, immediately ordered full speed astern on the BEREAN'S engines and gave her a hard right rudder, intending to put her aground. Compliance with these orders was immediate. The vessels were then closing on each other. There is nothing in the record on which the judge could find that a speed of 13 to 14 knots was not proper in the Channel. For that matter, appellant Mitsubishi practically concedes that such a speed below Morgan's Point would not be a negligent act. In any event, the district court has resolved the issue against the appellants and, in our view, such a resolution is not clearly erroneous. A prudent speed, under the circumstances, was an issue of fact for the judge, *Socony-Vacuum Oil Co. v. Smith*, 179 F.2d 672 (5th Cir. 1950).

Appellants' citations do not fit our facts. For instance, take *WM. A. PAINE*, 39 F.2d 586 (6th Cir. 1930), cited by China Union in support of its contention that BEREAN was guilty of statutory fault in proceeding at 13 to 14 knots. The *PAINE* involved an interpretation of certain regulations governing the speed of vessels through Maumee Bay Channel in the Great Lakes area. The regulation prescribed a speed of 10 miles per hour. Here, our regulation makes no mention of a maximum speed. There is no statutory speed limit in the channel applicable to the area of the collision. At the time of the collision in *DITMAR KOEL*, 65 F.2d 555 (5th Cir. 1933), the rules and regulations governing the use of the channel provided for a maximum

speed of 8 miles per hour. There, the judge held that a speed of 9 knots was excessive and this circuit upheld that finding. The statutory speed of 8 miles per hour was repealed by the adoption of the present rules. Additionally, the channel has been enlarged in depth and in width since the DITMAR KOEL decision.

Since we cannot say that the findings of the judge were clearly erroneous, we are governed by them. *Atkins v. Lorentzen,* 328 F.2d 66 (5th Cir. 1964). The decision in *GEORGE H. JONES,* 27 F.2d 665 (2d Cir. 1928), does not nullify the force or effect of the judge's findings against appellants on this issue.

## ASSIGNMENT III

Appellants say that the BEREAN failed to keep a proper lookout from the bridge, as well as from the bow, and in so failing, violated Article 20 of the Inland Rules, 33 U.S.C. § 221.[4] On this issue, the judge found that the BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 P.M. until the time of the collision. After so finding, the judge went on to hold that this failure did not cause, and could not have caused or contributed to, the collision. The judge found that Pilot Lary saw the RELIANCE several miles away and observed her lights constantly thereafter, and that, by reason of his familiarity with the channel, he recognized the danger at the earliest possible moment, under the then existing circumstances. He heard the only whistle given by the RELIANCE and

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4 "Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry light or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

took immediate action. During this period, Pilot Lary, the second mate and a helmsman were on the BEREAN'S bridge. Her captain was on the bridge a majority of the time. He had gone to his cabin shortly before the emergency and returned to the bridge only moments before the collision. It was the helmsman's duty to proceed to the bow of the ship to serve as a lookout for one hour after being relieved at the wheel and before returning to duty. However, a general practice was followed on the BEREAN, which permitted the helmsman a 10 to 15 minute coffee break after leaving the wheel and before proceeding to the bow, if weather and visibility permitted and the vessel was proceeding routinely. It was during this interval that the emergency arose. Both bow anchors of the BEREAN were ready to let go, but she had no one standing by the windlass to serve as an anchor watch. By reason of the nature of the channel in that area, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point. Other findings go into considerable detail on the issue of lookout.[5] The judge found that a lookout "could have done nothing more" than was done by the pilot of the BEREAN under the same circumstances and conditions.

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[5] "16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour."

"21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE."

"37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger."

Appellants' proctors, again in the brilliant light of considered hindsight, have carefully reconstructed the events leading up to the collision and argue that Pilot Lary could not have seen what happened and that the absence of a bow lookout was, in fact, causative. It is fundamental that the judge did not have to accept a theory adopted by counsel, as against the positive testimony of Pilot Lary, the watch officer Haugen and tug captain Starkweather. It is argued that the location of the RELIANCE'S anchors, following the collision, demonstrates that she moved extremely close to her port bank at the time her star-board anchor was dropped and that she then moved back toward the center of the channel before the port anchor was dropped. This argument shows the resourcefulness of appellants' proctors, but it does not prove that a bow lookout would have been of aid to the BEREAN. Obviously, the judge had more faith in the channel course, as shown by the RELIANCE'S instruments, than in post casualty theories, advanced by proctors. Furthermore, the judge could well have believed the testimony that the position in which the starboard anchor was found did not indicate that this was the position of the anchor at the time it was first dropped. Again, we observe that the judge had an opportunity to see and observe the witnesses. We are satisfied with his analysis of the evidence. His finding that the failure to have a lookout did not cause and could not cause or contribute to, the collision is supported by substantial evidence.

*THE PENNSYLVANIA*, 86 U.S. (19 Wall, 125 (1873)), and other cases cited by appellants, do not compel a different result. Appellants would have us give birth to a rule, that every vessel guilty of a statutory fault has the burden of establishing that its fault could not, by

any stretch of the imagination, have had a causal relation to the collision, no matter how speculative, improbable or remote. *THE PENNSYLVANIA* does not go that far and this court so stated in *Compania De Maderas v. THE QUEENSTON HEIGHTS*, 220 F.2d 120 (5th Cir. 1955), *cert. denied* 350 U.S. 824 (1955). Appellants reliance on *G. B. Zigler Co. v. Barker Barge Lines*, 167 F.2d 676 (5th Cir. 1948), and *Smith v. Bacon*, 194 F.2d 203 (5th Cir. 1952), place them on tenuous grounds. The decisions in *Zigler* and *Bacon* have been molded and placed in proper perspective by later decisions in *Parker Bros. & Co. v. De Forest*, 221 F.2d 377 (5th Cir. 1955), and *Atkins v. Lorentzen, supra.* Nor can appellants go outside the circuit and find comfort in authorities such as *Esso Standard Oil Co. v. THE MALUCO*, 332 F.2d 211 (4th Cir. 1964), or *Circle Line Sightseeing Yachts, Inc. v. City of New York*, 283 F.2d 811 (2d Cir. 1960). In *MALUCO* the pilot, in contrast to our situation, could not see the lights or maneuvers of the approaching vessel. If, in *MALUCO*, the judge had found that the pilot of the vessel saw everything which a bow pilot lookout could have seen, undoubtedly, the Fourth Circuit would not have reversed. The basic holding in that case was that the tug's general lookout was inadequate and that a special lookout was needed.[6] The most that can be said of *MALUCO* is that failure to maintain a lookout is not the equivalent of statutory fault, but does give rise to a strong influence that such failure contributed to the incident and imposes on the vessel a heavy burden to show, by clear and convincing evidence, that it did not so contribute. Here, the judge's findings and conclusions were within the permissible limits of that deci-

[6] "But if a special lookout was not needed, the tug must plead the adequacy of her general lookout in order to meet her burden." 332 F.2d 214.

sion. We feel that the decision of the same circuit in *United States v. SS SOYA ATLANTIC,* 330 F.2d 732 (4th Cir. 1964) (1964 A.M.C. 898, affirming 213 F. Supp. 7, 1964), rendered a few days after *MALUCO,* is more applicable to the case before us. There, the court held that the district court findings were binding unless clearly erroneous and that the absence of a lookout, having no other duties, is not a basis for a finding of fault if the bridge actually observes what a lookout should have seen. One of appellants urges that no one abroad the BEREAN was serving as a lookout solely in such capacity and without other duties to distract him. *Circle Line Sightseeing Yachts, Inc. v. City of New York, supra,* is cited. The distinguishing feature of *Circle Line* is that the lower court failed to make a finding on whether the lookout, with no other duties, could have seen the bridge earlier and either avoided the accident or, at least, diminished its severity. Here, as previously mentioned, the trial court found, as a fact that the absence of a bow lookout not only did not cause the collision, but could not have caused or contributed to it.

A discussion and analysis of other cases cited by appellants, such as *THE OREGON,* 158 U.S. 186 (1895); *THE FELIX TAUSSIG,* 5 F.2d 612 (9th Cir. 1925), *cert. denied* 269 U.S. 560 (1925); *Poling Russell Inc. v. United States,* 196 F.2d 939 (2d Cir. 1952), and *River Terminals Corp. v. United States,* 121 F. Supp. 98 (E.D. La. 1954), would add nothing to the enlightment of the profession nor to the validity of our conclusions.

The question of a proper lookout is one of fact to be determined from all of the circumstances on the basis of common prudence, there being no fixed requirement that a vessel maintain a "bow lookout" under the facts and cir-

cumstances here presented. The finding of the trial judge on this issue was clearly within the realm of reason. The evidence established beyond doubt that the absence of the bow lookout had nothing whatsoever to do with the collision.

## ASSIGNMENT IV

The appellants claim that the judge erred in exonerating the BEREAN, when the record shows that she failed to have an anchor watch and failed to drop her anchors.

The record supports the judge's finding that the BEREAN was not at fault in failing to have an anchor watch prior to or at the time of the collision, or in failing to drop her starboard anchor as ordered by her pilot. The evidence is clear that it was not the custom of the ships to maintain an anchor watch in the portion of the channel in question, particularly when the vessel had sufficient power, as the BEREAN had, to readily maneuver. Furthermore, the judge found that even if the anchor of the BEREAN had been dropped when her pilot ordered, this procedure would have had little, if any, effect on slowing the vessel and would not have prevented the collision. In other words, BEREAN took the quickest and most certain method of losing headway by running aground. The record shows, and the judge found, that when the BEREAN'S pilot recognized the emergency and ordered the engines full astern and a hard right rudder, he likewise ordered the starboard anchor dropped. The starboard officer who was on the bridge with the pilot immediately started to obey the order. Before he reached the bow he felt the BEREAN go aground and observed the RELIANCE bearing down on the port bow of his vessel in a manner which presented an inevitable collision. For that reason, he did not try to drop the anchor.

The BEREAN ran aground on her starboard side of the channel, either immediately before or at the time of the impact. At such time, she had little, if any, headway. Likewise, the RELIANCE had lost most of her speed at this time. Appellants' argument that if the BEREAN had an anchor watch, he could have forthwith dropped the anchor and thus stopped the BEREAN and avoided the collision, is directly opposed to the findings of the judge. There is little, if any, evidence to support this argument. For that matter, the great weight of substantive evidence is against such a contention. The dropping of an anchor when a vessel is making 8 or 9 knots would, on the record, violate good seamanship. Most of the experts were of the view that the dropping of an anchor or anchors from a vessel proceeding to five knots or more, with a view of stopping or even slowing the vessel, would be highly dangerous and probably futile. Such a maneuver would burn the brake bands and at a speed of 8 to 10 knots would result in breaking the anchor chain. No witness testified that he ever dropped an anchor under such circumstances. The expert testimony on this subject was not only convincing, but was in line with what would seem to be good common sense.

Typical of the cases cited by appellants are *THE VIRGINIA*, 25 F.2d 623 (2d Cir. 1928); *River Terminals Corp. v. United States, supra,* and the *Mariblanca Navegacion, S.A. v. Panama Canal Co.,* 182 F. Supp. 369 (D.C. C.Z. 1956), *aff'd.* 298 F.2d 729 (5th Cir. 1962). As applied to the facts of this cause, those cases give us nothing of substance. *Mariblanca* involved a defective steering gear and failure to drop anchors in the Panama Canal. That area is governed by a specific statutory requirement that

anchors be in a state of readiness for letting go.[7] There, the judge held that the accident was caused by a failure of the vessel's steering mechanism and by failure of the vessel's personnel to promptly execute the orders of the pilot with respect to the engines and anchors. In the final analysis, this case merely stands for the proposition that an appellate court will not set aside the finding of a judge unless "clearly erroneous." *THE VIRGINIA* involved a "comedy of errors." The third officer was sent forward to let go an anchor, but dropped the wrong anchor. This required the third officer to run forward to the forecastle head and drop anchor. This he did, but dropped the starboard instead of the port anchor thereby pulling the vessel so that she sheered directly toward the ship with which she collided. The appellate court, on this issue, merely affirmed the finding of the judge. Following the same pattern is the decision in *River Terminals Corp., supra.* There, the judge found that the dropping of anchors might have avoided the collision—that the failure to drop them was at least a factor contributing to the casualty.

A discussion of other cases cited by appellants would only lengthen an opinion which, with much left to be said, is already beyond the Pale.

## ASSIGNMENT V

China Union, and Lan Jing Chau, et al, charge that the BEREAN was unseaworthy by reason of dangerous cargo being placed in a forward wing tank, next to the skin of the ship. This assignment is related to, but must be distinguished from, the assignment of these appellants that Cyanamid was at fault in failing to warn the BEREAN of

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[7] 35 C.F.R. 4.41.

the lethal qualities of the cargo. Later, we shall treat of that charge and of China Union's standing to raise these questions.

As early as 1871 the Congress took an interest in legislation on dangerous articles or substances in commerce.[8] The legislation in effect at the time of the casualty[9] empowered and directed the commander of the Coast Guard, in order to secure effective provisions against the hazards of health, life, limb or property created by explosives or other dangerous articles or substances, to, by regulation, define, describe, name and classify all explosives or other dangerous articles or substances and to establish such regulations as might be necessary to make effective the provisions of the section with respect to the descriptive name, etc.[10] The legislation further provided that the transportation, stowage or use of such articles or substances should be in accordance with the regulations. These statutes, and the regulations promulgated thereunder,[11] make it clear that the duty is placed on the Coast Guard to properly examine, analyze and classify all cargoes such as the one here in question. It did so examine this type of cargo and classified it as Grade C flammable liquid, it being placed, as previously mentioned, in the same clasification as gasoline, benzine, naptha and other such substances.[12] It was not classified as a poison either "extremely dangerous" or "less dangerous,"[13] or with having lethal characteristics. It has been said, and rightfully so,

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8 16 Stat. 440.

9 46 U.S.C. §§ 170, 170 (a), 170 (b).

10 46 U.S.C. § 170 (7) (a).

11 46 C.F.R. 146.01.

12 45 C.F.R. 146.21-100.

13 46 C.F.R. 146.25-5; 146.25-10.

that these statutes and the regulations promulgated thereunder amount to much more than a set of prohibitions with punitive sanctions. They establish a standard of care. *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964).

The judge found that the BEREAN was not at fault in carrying acrylonitrile in her forward wink tank. The ship had been engaged in the chemical trade for several months following her construction, and prior to the collision carried various kinds of petroleum products and other flammable liquids in her forward wing tanks. The shell, or skin, of the ship constitutes the outer wall of certain of her wing tanks. No protective cofferdams or voids surrounded these tanks. Under pertinent Regulations those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics."[14] Acrylonitrile is similar to gasoline in its burning and explosive characteristics. In addition, it is toxic, and gives off poisonous fumes. These fumes cause illness to persons exposed thereto in relatively weak concentrations over a prolonged period of time and may cause illness or death from a single exposure if in a sufficiently high concentration. Symptoms of this poison are similar to those of cyanide.

Appellants claim that the Coast Guard was in error in not classifying acrylonitrile in the same classification as poisonous gases, or with those having lethal characteristics, as to which different regulations apply. It is said that such a cargo should not be carried in the forward tanks, or that a cofferdam or void space should have been provided between the tank and the skin of the ship. A rule that this type of material should not be carried in the forward tanks of the

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14. 46 C.F.R. Part 39.

vessel would probably destroy a substantial segment of the carrying capacity of most tankers. The fact, if it be a fact, that "a large majority of collisions are on the bows of vessels" does not mean that the forward part of a vessel should not be used for the purpose of transporting liquids such as acrylonitrile. No custom or usage is advanced to support this argument. No Regulations were violated by placing the cargo in the forward tanks. For that matter, the regulations of the Coast Guard invited the procedure which was followed by BEREAN in the stowage of this cargo. The charge that the cargo should have been stowed in tanks with a cofferdam, or void, apparently was suggested by a Regulation covering the stowage of "flammable or combustible liquids having lethal characteristics." The appellants concede that the Regulations, in effect at the time of the casualty, did not classify the chemical as a flammable or combustible liquid having lethal characteristics.

The Regulations properly distinguish between a chemical which is highly flammable and a chemical which is highly toxic or one having lethal characteristics. Of course, a chemical may be both flammable and toxic and, if sufficiently toxic, should be placed in a different classification than one which is only flammable. To be kept in mind is the fact that the Bill of Lading issued by Andersen to Cyanamid, specifically described the cargo as acrylonitrile, and that the Regulations did not classify the chemical as an explosive, or as a Class A, B or C poison. During the course of the negotiations leading up to the issuance of the Bill of Lading, the export manager of Cyanamid furnished to representatives of Andersen the pamphlet entitled, "Handling-Storage-Analysis of Acrylonitrile." The physical properties of the chemical, including its explosive limits, the fact that it was toxic and that it was flammable are set

forth in the pamphlet. This is conceded by Andersen. However, it is argued that the ship, and her owner, had a right to rely on the classifications of the Coast Guard made pursuant to the statutes and regulations, and that a stowage of cargo in accordance with such regulations, insulates the vessel and her owner against a charge of unseaworthiness or negligence in connection with such stowage. Although the language used in *Marshall v. Isthmian Lines, Inc., supra,* p. 134, 135[15] speaking of the Regulations, was employed in connection with a factually distinguishable background, we think the rule there stated is sound, and should be applied to this charge against BEREAN and Andersen. Another statement of the same legal principle is that official duty has been legally performed. The law so presumes. *Board of Public Instr. v. Osburn,* 101 F.2d 919 (5th Cir. 1939); *Continental Bank & Trust Co. v. Brandon,* 297 F.2d 928 (5th Cir. 1962); *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14-15 (1926).

We do not believe that BEREAN and Andersen were required to inquire into the validity of the classification of the chemical made by the Coast Guard experts. As applied to the ship and her owner, there was nothing in the Cyanamid pamphlet which would require a different result.

Again, on this point, we are faced with a line of authorities that are distinguishable. Take for instance the *Petition of Oskar Tiedemann and Co.,* 289 F.2d 237 (3d Cir. 1961). The question before the judge was whether the owners of a tanker could claim limitation of liability after they al-

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15 334 F.2d 134, 135.

"The whole statutory scheme is something much more than a set of prohibitions with punitive sanctions. It establishes a standard of care to which all concerned are bound, including those who do, and those who do not, wish to comply."

lowed her to sail with tanks that had been emptied of a cargo of petroleum, but contained flammable fumes. The court found that the fumes were more dangerous than liquid cargo and that the vessel did not have proper gas-freeing apparatus and was, therefore, unseaworthy. Again, this is a case where the findings of the judge were upheld. In *C. J. Dick Towing Co. v. THE LEO*, 98 F. Supp. 455 (S.D. Tex. 1951), *aff'd.* 202 F.2d 850 (5th Cir. 1953), gasoline or some other explosive liquid had been allowed to leak into the end section of a barge. This section was not intended for cargo. The judge held that those in charge of the vessel were negligent in not properly inspecting the tow and in allowing the rake tank to be in such a condition that it was a menace and a hazard. Of course, there is no such finding before us. That the existence of gasoline or other explosive fumes, in an area of a ship not designed for that purpose, creates an unseaworthy condition, we have no doubt. No such problem confronts us. The negligent stowage of flammable cargo in a maner which violated approved methods of stowing naphthalene as delineated in the safety regulations of the Coast Guard and of the Dutch Government, was presented by the facts in the *Petition of SKIB A/S JOLUND*, 250 F.2d 777 (2d Cir. 1957), reaffirmed on second appeal 269 F.2d 68, *cert. denied* 356 U.S. 933 (1958). That case offers an interesting dissertation on that type of liability, but is here of no significance. The same can be said of *In Re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952) and *Dalehite, et al, v. United States*, 346 U.S. 15 (1953). Such decisions do not remotely support appellants' contention that a tanker may not store flammable cargo in her bow tanks. Again, we have an issue which the judge resolved against appellants. The evidence supports his finding.

## ASSIGNMENT VI

Appellants Mitsubishi and Consul General part company with China Union, on the latter's contention that the judge erred in denying it a limitation of liability under 46 U.S.C. § 183 (a).

Our analysis of the record convinces us that the judge was correct in denying China Union limitation and in holding that its own negligence with privity and knowledge contributed to the unseaworthiness of the RELIANCE and the collision as follows:

(a) her steering gear was unseaworthy;

(b) her main engines were unseaworthy;

(c) her captain and chief engineer were not instructed to the effect that all four of her main engines might be coupled astern; and

(d) her telephone communication system between the bridge, engine room and steering engine room was unseaworthy.

We have already dealt, at length, with the judge's findings on the fault of the RELIANCE. Those findings are buttressed by an adequate record. To here repeat those findings would be repetitive in the extreme.

Privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection. Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation. The judge in holding that there was privity and knowledge on the part of China Union and in denying limitation was well within

the standards applied in *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963).

Instead of showing that the unseaworthiness of the steering gear of the RELIANCE was without the privity and knowledge of China Union, its witnesses provided damaging testimony clearly showing the contrary. First of all, the Greek Nationals, by whom the vessel was sold to China Union, would not permit a thorough inspection of the vessel by its representative. On the limited inspection he made, he found many conditions in the engine room which were sub-standard. On his survey of the RELIANCE, he found the door of the steering engine room locked. On arrival of the vessel in New Orleans, the first chief engineer recommended to the company that all auxiliary engineering equipment be opened, inspected and overhauled. Nothing was done on this recommendation. China Union, evidently in an effort to save expenses, did not make such inspections, breakdown or overhaul. The testimony is quite clear that China Union would not permit a thorough inspection of the steering gear while the ship was in Taiwan. Many spare parts, which would be normally carried on a vessel of this type, were missing and, in particular, essential parts in connection with the steering apparatus were missing. This, and other evidence, fully supports the judge's finding[16] of privity and knowledge of a defective

[16] "The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost constant difficulties

steering gear on the part of the owner. Likewise, the judge's findings that the vessel was unseaworthy in the other respects with the privity and knowledge of China Union are as fully supported by the evidence. *THE CITY OF CAMDEN*, 292 F. 93 (3rd Cir. 1923), cited by China Union, lends neither substance nor support to its contention. On the other hand, the principles stated in that case are in full accord with the findings here under attack. The burden of proof as to the absence of privity or knowledge was on China Union. *Coryell v. Phipps*, 317 U.S. 406, 409; *States S.S. Co. v. United States*, 259 F.2d 458 (9th Cir. 1958), *cert. denied* 358 U.S. 933 (1959), *rehearing denied* 359 U.S. 921 (1959); The Law of Admiralty, Gilmore & Black, 705.[17]

We do not question the soundness of the authorities cited by China Union on this assignment. Yet, the attempt by it to apply the doctrines stated in those cases to our factual background is entirely unsuccessful. Her claim that the RELIANCE'S sheer across the channel was caused by her navigating too close to her starboard bank is foreclosed by the judge's finding that the sheer was caused by unseaworthy steering gear. The district court's findings that the RELIANCE'S main engines were unseaworthy and that her captain and chief engineer were not properly instructed prevent a successful assault along those lines. China Union states that there is no evidence whatsoever to support the

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encountered with the main engine, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction." (F. 31, R. 5133-5134.)

[17] "It seems reasonable that the shipowner, who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge."

judge's finding that the RELIANCE's telephone communication system between the bridge, the engine room and the steering room was unseaworthy. This statement is clearly wrong. The record contains uncontradicted evidence that when the emergency arose on the RELIANCE, and communications had to be made between the bridge and the engine room, and between the bridge and the steering engine room, this was accomplished by sending messengers running about the ship, rather than by attempting to use the sound powered phones. Certainly, this creates a strong presumption that the phones were out of order. This evidence and the inferences to be drawn therefrom, clearly support the judge's finding that this condition contributed to the collision and that there was no direct means of phone communication between these important stations on the vessel. Obviously, a prompt telephone call to the steering engine room for full speed astern, might well have averted the collision.

There is no substance to this assignment.

## ASSIGNMENT VII

On this assignment, appellant China Union disclaims liability on the theory that the fire originated from the other vessel and that it, as a carrier, was protected under its Bill of Lading and the Fire Statute.

The provisions of CGSA[18] required China Union to exercise diligence: (a) to make the ship seaworthy; (b) to properly man, equip and supply the ship. Subsection (8) of the Act nullifies any clause, covenant or agreement in a contract of carriage which would relieve the carrier or the ship from liability for loss or damage, to or in connection

18 46 U.S.C. §§ 1300, et seq.

with the goods, arising from fault or failure in duty in the obligations imposed by the Act. 46 U.S.C. § 1303 (8). Section 1304 (1) places on the carrier the burden of proving due diligence when the loss or damage results from unseaworthiness. These provisions and the finding by the judge of unseaworthiness on the part of the RELIANCE, places the petitioner beyond the protective provisions of the Act. The particular fire was "caused by the actual fault with privity of the carrier." CGSA offers no escape to China Union. Even if the issues were doubtful they would be resolved in favor of the cargo. *THE SOUTHWARK*, 191 U.S. 1 (1903); *Artemus Maritime Co., Inc. v. Southwestern Sugar & Molasses Co., Inc.*, 189 F.2d 488 (4th Cir. 1951).

## CLAIM AGAINST CYANAMID

China Union and the Consul General complain of the action of the judge in dismissing the libel against Cyanamid. Aside from the subject discussed under Assignment V, the appellants pose two additional assignments against Cyanamid: (1) the procedure on the dismissal, and (2) that Cyanamid had actual knowledge, or by the exercise of reasonable diligence should have known, of the dangerous, poisonous and lethal characteristics of acrylonitrile, of which the Coast Guard and BEREAN had no knowledge.

At the outset, we must stress the grave doubts we entertain on whether China Union has standing to press these assignments. The damage to RELIANCE and its cargo was caused by fire, not by the poisonous or toxic qualities of the chemical. Since gasoline and other such products are as flammable and explosive as acrylonitrile and since such other products may be legally carried in forward tanks, next to the skin of the ship, it would seem that no causal relationship exists between the toxicity of that chemical

and the fire damage to China Union's property, or its cargo.

(1) The first point is one of procedure, rather than substance. The record shows that during the course of the trial, the judge asked all parties if all evidence, except as to damages, had been presented against Cyanamid. After counsel for the respective parties indicated that they had no additional evidence to offer against that company, its proctor moved for a dismissal.[19] Forty pages of the record are devoted to a transcription of the arguments of the proctors on this motion. No claim was made that there was additional evidence to offer on the subject. For that matter, the precise issues raised on this appeal were fully argued to the judge. At the conclusion of the arguments, the motion was taken under advisement and was not decided until the following morning, at which time the judge found in favor of Cyanamid.[20] Obviously, the judge made findings on the issues then before him. In the formal findings, the judge made it clear that he was passing on the issue

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19 "Mr. Waesche: If Your Honor please, in that event we would like to move to dismiss the action against American Cyanamid, on the grounds that the libelants have failed to establish a cause of action against them." (R. 3413.)

20 "As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R.3454.)

of the liability.[21] We must view this record as the findings of the judge on the issues then presented. Those findings, unless clearly erroneous, even though informal, are binding on us. *Myles v. Quinn Menhadden Fisheries*, 302 F.2d 146 (5th Cir. 1962). The fact that the findings were made on a motion for dismissal, or for a *directed verdict*, as argued by one of appellants, is of no significance.

(2) On the motion for dismissal, the proctor for Cyanamid argued that the evidence almost conclusively demonstrated that the Chinese crew men died or were injured as a result of the raging fire, on the water and on the RELIANCE. Proctor for the dead and injured seamen, on the other hand, argued that the men died from, or were injured by, the toxic and poisonous effects of the chemical. Cyanamid pointed to the evidence of a young lieutenant of the Coast Guard who testified that he and his men worked right at the hatch where the particular cargo was loaded, and from there fought the fire with no ill effects. A number of the members of the crew of the BEREAN testified that they went forward and fought the fire with no ill effects. The master of the tug boat said that he was in there fighting the fire. Members of the crew of RELIANCE were on the foredeck fighting the fire. Most of the photographs of decedents, with one exception, disclose faces and bodies that were "badly charred."

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21 ". . . **At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence produced by petitioner.** The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against the respondent." (Emphasis supplied.) (R. 5118.)

The one major exception was the picture of a Chinese second mate, who evidently died in the cabin deck washroom. He was not burned, nor was there anything else observed which pointed to the cause of his death. The photograph in evidence, and the testimony shows, that the pilot Duncan was burned beyond recognition.

In support of his position, proctor for the injured and decedents, called attention to the unburned body of the second mate that was found in the washroom, the body of the oiler-wiper who was found above the main deck and who was not "burned too seriously," and to the testimony of the funeral director that he examined five bodies which were recovered in Galveston Bay, over one week after the casualty. He testified that he did not find burns "to any noticeable degree." These bodies were puffed and swollen to such an extent that examination was difficult. The undertaker thought that the death of each of these men was caused by drowning.

Even the death certificates do not support the theory that death could have been caused by the toxic or poisonous effects of the chemical under observation. Five of the certificates gave the cause of death as "drowning, due to jumping overboard"; five of the certificates gave the cause of death as "suffocation, 2nd & 3rd degree burns," and one certificate gave the cause of death as "septisemia, due to major thermal body burns." Even as to the decedents whose deaths were attributed to drowning, the funeral director conceded that there were burns on the bodies.

In any event, both in the testimony and on the argument, the theory of the Consul General was fully presented to, and explored by, the able trial judge. After analyzing all of the evidence, he found that the deaths and personal

injuries were caused by fire.[22] While this specific finding was not made at the time of ruling on Cyanamid's motion for dismissal, no additional evidence was produced on the subject. For that matter, the final dismissal as to Cyanamid is a part of the main interlocutory decree, from which this appeal is prosecuted. This dismissal, of course, was entered after the entry of the findings and conclusions. Therefore, Cyanamid is entitled to the benefit of each finding on which the decree is based.

If, in fact, it could be said that the judge failed to make a finding on the issue of the cause of death or injuries, nevertheless, the burden of proof on that issue was on the Consul General. Consequently, all facts not embraced in the specific findings should be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens,* 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant,* 143 F.2d 170 (7th Cir. 1944), *cert. denied* 323 U.S. 734. Appellant had a right to seek a specific finding if he so desired.

Any other finding by the judge, on the record before him, would be based on pure speculation and guess work. This is conceded by Dr. Brieger, the principal witness for China Union and its dead and injured crew members, who testified that an autopsy would be required before even an expert could express an opinion on whether any one of

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22 "As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130.)

these men died from exposure to acrylonitrile.[28] With the opinion in the record, a trial judge could arrive at no conclusion other than that the Consul General had failed in his burden of showing that death or injury was caused from the toxic effects of the acrylonitrile.

Completely disregarding the effect of the controlling finding that fire was the cause of the deaths and personal injuries, both China Union and the Consul General again point to testimony indicating a practice in the chemical industry to construct cofferdam space around tanks in which dangerous chemicals are to be transported and that one of the purposes of such construction was to prevent the escape of such chemicals in the event of a collision. Other testimony indicates that it was a common practice in the industry to carry dangerous chemicals away from the skin of the ship. Doctor Brieger testified that sufficient bodily contact with acrylonitrile would, in his opinion, cause death by ingestion or by inhalation of its fumes. He, likewise, opined that acrylonitrile was much more poisonous than a five percent dilution of hydrocyanic acid which, by Coast Guard Regulations, was classified, for transportation purposes, as a Class B poison. He thought that the statement in Cyanamid's literature that acrylonitrile produces symptoms "similar to those produced by hydrogen cyanide"

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[28] "An autopsy would show whether the man, in addition to the effect of the fire, has absorbed large quantities of acrylonitrile, which, as I have told, will be converted into cyanide, a very easy affair; it can be shown with a spectrophotometer and otherwise; and if such an autopsy is made, one can state whether this individual had absorbed such quantities of acrylonitrile that they in themselves would have killed this man. **But this can only be done—such a statement can only be made if a proper autopsy has been made, or if the blood is bright red; that's a much simpler method. It would indicate that the man has indeed absorbed very large quantities or large quantities of acrylonitrile, with the consecutive development of cyanide.**" (Emphasis supplied.) (R.2129.)

was incorrect. His thought was that the symptoms were precisely the same, but this is a mere play in words, and not of substance. He also believed that if rat tests had been made by the Coast Guard with the chemical, it probably would have been classified in a Class B category as toxic or poisonous in nature. The judge was not bound to accept and apply these opinions. He was only bound to give to them such weight as he thought they deserved and he was at liberty to entirely reject them if he felt that the reasons given in support thereof were unsound. This rule is applicable to a trial judge, as well as a trial jury. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Also, the judge had the opportunity to see and hear the witness and pass on his credibility.

Beyond that, the printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error. Of significance, though not controlling, is the fact that the casualty occurred in November, 1961. There was an immediate Coast Guard investigation. The classification of acrylonitrile has been reviewed by the Coast Guard on at least three occasions[24] since the casualty and remains in the same classification. The legal principles applied in *Whorton v. T. A. Loving & Co.*, 344 F.2d 739 (4th Cir. 1965), are sound, but the factual background there discussed is so far removed from ours that such principles

[24] (1) 46 C.F.R. § 146.21-100, p. 172, § 146.25-200, p. 495-694; (2) 46 C.F.R. § 146.10-100, p. 20, § 146.25-200, p. 220-256; (3) Federal Register, December 24, 1964, Vol. 29, No. 248, pp. 18163-18168.

cannot be here applied. For the purpose of this opinion, we have assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual.

Aside from everything else, it would appear that the proximate cause of death of and injuries to the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed. The remarkably clear pictures in evidence demonstrate that the RELIANCE ruptured the skin of the BEREAN and advanced into the hull to a depth of approximately 14 feet. Obviously, the inside skin of a cofferdam would have been ruptured and such a dam would not have prevented the escape of the chemical. Under the weight of this assault, a cofferdam would have provided no more protection that would a sheet of tissue paper.

## CLAIM OF UNITED STATES

China Union alone challenges the claim of the United States. The claim consists of three separate items:

(1) expense of removing and re-anchoring the RELIANCE, $8,582.00, and

(2) expense of shipkeepers and similar expenses to preserve the property, $6,031.38, and

(3) expense of stand-by tug to prevent the vessel from moving and re-blocking the channel, $21,188.00.

That the RELIANCE, as a result of the casualty, became a flaming derelict which imperiled the very existence of other watercraft and obstructed and prevented the navigation of the channel, is beyond argument. The owner and underwriters were unable to control the fire. Acting under the emergency provisions of 33 U.S.C. § 415, the United States District Engineer, after a special investigation, made a determination that the RELIANCE was a special danger to navigation and, after notice to owner, directed that the vessel be towed from the channel and anchored in Bolivar Roads, adjacent to the channel.

After removal of the vessel, the United States filed a libel, asking for the sale of the vessel,[25] to pay the cost of removal and incidental expenses. This proceeding was enjoined, on November 29, 1961, on China Union's petition for a limitation of liability. After granting the injunction, the judge required China Union to pay into court the cost of removal of the vessel in the sum of $8,582.00. Other proceedings, and allowances, are outlined in detail in *American Cyanamid Co. v. China Union Lines* 306 F.2d 135 (5th Cir. 1962), in which proceeding the circuit court refused jurisdiction, but suggested that the district judge might make findings on the issues presented.

On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds $8,582.00, the expenses of removal. While the Government could not proceed *in personam*, against China Union, *United States v. Bethlehem Steel Corp.*, 319 F.2d 512 (9th Cir. 1963), *cert. denied* 375 U.S. 966 (1964) and *United States v. Zubik*, 295 F.2d 53 (3rd Cir. 1961), we must remember that

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25 Sold as scrap for $109,100.00.

it was China Union which was seeking the injunction and a limitation of its liability. It was to its advantage, and the advantage of its underwriters, to free the RELIANCE of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right.[26] The order of the court did not amount to a judgment *in personam* against the petitioner, but merely required China Union to do what it should have done in the first instance.

On December 3, 1962, after receipt of the mandate of the Court of Appeals, the judge held a supplemental hearing, at which time testimony was taken and exhibits introduced in connection with the nature and reasonableness of the Government's and other claims. Eighteen witnesses testified at this hearing and there is solid evidence to support the finding in favor of the Government. The fact that the judge's finding on the subject, is included under his conclusions of law,[27] is of no significance. *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil*

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[26] "Had this Court not intervened . . . the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A." (Order, January 28, 1963.)

[27] "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States."

*Co., et al*, 292 Fed. 846 (2d Cir. 1923); *Arkansas Amusement Corp. v. Kempner*, 57 F.2d 466 (8th Cir. 1932). Even in the absence of a finding of fact, this being a trial *de novo*, we would be compelled to say that the record fully supports the pertinent provisions of the interlocutory decree. True enough, specific amounts are not mentioned in this finding. However, there can be no misunderstanding as to the amounts, in that the division of the Government's claim, both in the exhibits and the testimony, was uniform and precise. They are the figures which are set forth, with exactness, in the interlocutory decree.

It is our view that item (3) of the Government's claim is also covered by the provisions of 33 U.S.C. § 415, and that the lien against the RELIANCE for such item was also first in time and prior in right. The statute contemplates that the Government hold said vessel for a period of thirty days, after notice to the owner, and thereafter until sale. It is logical to assume that the Congress intended the Government to take proper care of the vessel during possession. The "expense of removing," in our opinion, should not be limited to the precise cost of removing the vessel from the place of the casualty to a place of safety, but should also cover any and all reasonable expense incidental to the removal and enforcement process, such as the expense of safe-guarding. This expense is contemplated by the statute. Petitioner's arguments that the tug hire of $21,188.00 was not a legitimate expense, is illusory in the extreme. The record discloses many considerations which weighed in favor of having the tug stand by, rather than using two anchors. The District Engineer, after consultation with Coast Guard officers, decided to use only one anchor and have the tug stand by, so as to be assured of its immediate availability in case the anchor did not hold.

Those making the decision were of the opinion that (1) two anchors might foul the vessel, (2) the anchor windlass and the deck supporting it had been subjected to severe fire, (3) the "upper shots" of the anchor chain had been subjected to severe heat, (4) the Galveston area was subject to severe changes in weather conditions, (5) the tide was exceptionally swift where the vessel was anchored, and (6) the vessel, even with dual anchors, might well slip back into the channel. True enough, the court eventually found that the tug was not necessary to keep the RELIANCE at its anchorage, and this is the point on which China Union principally relies. Here, the mischievous aura of validity which lurks behind the veil of hindsight is again presented. The original action of the District Engineer in ordering the tug to stand by, when viewed in light of his obligation to protect the traffic in the channel without unduly jeopardizing the vessel and its cargo, is quite understandable. The judge's action, in subsequently ordering the tug dismissed, was taken after more than two weeks of actual experience in holding the vessel at anchor. It does not imply disapproval of its previous use; indeed, doubtless because of his own wise reluctance to be governed by hindsight, the judge expressly refused to pass on that question at that time. The record reveals no subsequent developments weighing against his ultimate approval of the charge.

On November 27, 1961, the judge dismissed the tug from standing by the RELIANCE and, on that day, placed shipkeepers aboard pending the further order of the court. At the same time, custody of the vessel was taken by the United States Marshal and the court was thereafter in possession. Earlier, on November 24th, the District Engineer, acting on order from the United States Attorney's

office, caused shipkeepers to be placed aboard and the cost of employing those shipkeepers, round the clock, both before and after the court order is, in major part, the basis for the Government's claim of $6,031.38. China Union charges that the Government was no longer in possession of the vessel and is not entitled to this allowance. This claim is without validity, whether we view the service performed as under the statute, or as an allowance by the court to the Government for expense incurred in connection with protecting the vessel, after the seizure by the Marshal. Our only area of doubt is whether any allowance should be made for the three day period November 24-27, when the tug was also standing by. It does not appear that this "over-lapping" was called to the attention of the judge and he may want to take another look at this feature in the other proceedings which must be hereafter conducted by him. We believe that the employment of the shipkeepers on and after November 27th, should be treated as an "expense of justice" and entitled to perferential treatment. *New York Dock Co. v. S.S. POZNAN*, 274 U.S. 117 (1927); *THE ST. PAUL*, 271 Fed. 265 (2d Cir. 1921). Since these expenses were necessary they should be allowed. *Yokahama Bank v. Wong*, 113 F.2d 329 (9th Cir. 1940); *THE TRANSFER NO. 7*, 176 F.2d 910 (2d Cir. 1949).

## OTHER CLAIMS

China Union claims a right to payment of its own salvage expenses out of the limitation fund, on the theory that the value to be surrendered in a limitation proceeding is the value of the owner's interest in the vessel immediately after the casualty. Here, we call attention to the fact that the judge reserved ruling on this particular issue and at one time indicated that he favored the position of China

Union.[28] One of the provisions of the interloctuory decree makes it crystal clear that the judge was not passing on the issues between claimants to the limitation fund.[29] The validity of petitioner's salvage claims, including its claim for the refund of said $8,582.00, and other sums previously paid into the registry, are subject to the "further orders" of the District Court.[30]

The assessment of interest against China Union on the originally unlisted prepaid freights, was a matter within the sound discretion of the judge. Petitioner's claim that it proceeded in the utmost good faith, in withholding such freights, was a subject to be weighed and considered by the judge in charge of the proceeding. Obviously, he felt that the petitioner's action, in consistenly attempting to set off its claimed salvage charges against the amount of the prepaid freight and interest, was arbitrary and unnecessary. The record supports this assessment of interest. An allowance of interest is recognized in *LA BOURGOGNE*, 139 Fed. 433 (2d Cir. 1905); *LA BOURGOGNE (Deslions v. LaCompagnie Generale Transatlantique)*, 210 U.S. 95 (1908). Even if viewed as a penalty, the exaction of the interest under the facts in this case would be justified.

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28 Order, January 28, 1963.

29 "(3) That after payment of the Trustee's expenses, as hereinabove provided, the claim of the United States of America shall be paid as hereinafter provided, **following which any funds remaining in the registry of the Court shall remain pending further orders of this Court.**" (R. 5148.) (Emphasis supplied.)

30 China Union, whose fault was the sole cause of the casualty, may not be entitled to make a claim for salvage, THE CLARITA and THE CLARA, 90 U.S. 1, 18 (1874).

## CONCLUSION

On appeal in an admiralty case, the appellate court is bound by the findings of the trial court and they will not be set aside unless the party seeking to have them overturned demonstrates that they are not supported by credible evidence, or were induced by an erroneous view of the law. *Trinidad Corp. v. Indian Towing Co.*, 293 F.2d 107 (5th Cir. 1961), *cert. denied* 369 U.S. 861; *Ohio Barge Line, Inc. v. Oil Transport Co.*, 280 F.2d 448 (5th Cir. 1960).

On the entire record, to considerable of which we have made specific reference, we hold that the trial judge's findings were amply supported by substantial evidence, and not clearly erroneous. We have a firm conviction that each of the parties received a fair and an impartial trial. We find nothing in the brief of Lucy Duncan to justify striking the same from the file. The motion is denied. The interlocutory decree is affirmed.

BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in all of the very excellent opinion prepared for the Court by Judge Kilkenny except as to some portions in the section entitled "Assignment V" as to which I have some reservations and that part entitled "Claim Against Cyanamid" which I believe to be erroneous. As to the latter I dissent. My difference would not change the result as between BEREAN and RELIANCE, between RELIANCE'S Cargo and RELIANCE, between the injured/decedents and RELIANCE and her owners, or the denial of relief as to injured/decedents against BEREAN. It would afford RELIANCE and the injured/deceased victims the right to show that damages and injuries were caused or ag-

gravated by Cyanamid's neglect of its duties. To this extent and for this purpose, I believe the case should be reversed and remanded.

As to "Assignment V.," I accept the proposition that a shipowner is entitled to rely on the classification of the material and the stowage requirements prescribed by the regulatory agency, here the Coast Guard. There may, however, come a time when a carrier acquires so much knowledge about the peculiar characteristics of a particular cargo, which are not generally known, that it can no longer rely solely on the insulation afforded by reading and applying Coast Guard regulations which it knows in fact are either wrong or incomplete. The aim of the regulations, the aim of the law, is to promote safety, especially to the innocent third parties—crew members, longshoremen, persons on other vessels, members of the public, and others—who are likely to be exposed to the hazards of the product in its normal course of distribution, transportation, and handling. That aim is hardly achieved by an absoluta which declares that a shipowner may ignore hazards not disclosed by the Regulations, but of which it knows and knows how to minimize by prudence. This is a long way from making every shipowner his own chemist, physicist, physical chemist, or the like in this day of scientific marvels and new esoteric products.

But Cyanamid is in no such favored position. It is the manufacturer and supplier of a chemical that it knows can and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It cannot rely on—and the proof does not even begin remotely to suggest that it ever did, or would, rely on—the Coast Guard. Cyanamid knows that if it—a huge industrial enterprise which proudly claims a pre-

eminence in this chemical field—relied on the Coast Guard with its limited laboratory facilities for its research and development, it would go bankrupt. The Coast Guard might come to it, but it would never, simply never, go to the Coast Guard to ascertain what the characteristics and hazards of its own product are.

So while the law affords to BEREAN the right to accept a faulty Coast Guard classification, Cyanamid can claim no such privilege. Its own published pamphlet entitled "Handling-Storage-Analysis of Acrylonitrile," introduced as an exhibit and to which the Court's opinion refers, makes it clear that it was, as Dr. Brieger testified, no less toxic than a Class B poison since it was more toxic than the test standard 5% dilution of hydrocyanic acid. Dr. Brieger had preeminent qualifications which Cyanamid never challenged—indeed could not challenge.[31] If, as the Court suggests, his testimony was guarded, occasionally hesitant, it was, as the quoted reference to autopsies (see note 23) reveals, just another clear proof of his scientific competence. Time and time again, he made plain, based upon a lifetime study and industrial experience with this very compound, that for seamen to be afloat in water having a film of Acrylonitrile on the surface[32] would mean almost certain death.[33] And that is what Cyanamid's own pamphlet re-

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[31] Dr. Brieger had made tests and reports on Acrylonitrile which were submitted to Cyanamid.

[32] In the collision, No. 1 port wing tank was ruptured. All of the 226 tons of Acrylonitrile spilled out into the channel.

[33] Ironically the record reveals that about a year after this collision, the Master of BEREAN was killed by Acrylonitrile fumes resulting from a very small leak in the pump room. No one, certainly not Cyanamid, suggests that this post-collision event was an untoward surprise to those knowledgeable about Acrylonitrile.

flected in vivid terms.[34]

[34] As to handling the chemical, Cyanamid explains:

> "The precautions set forth in this bulletin are the results of the experience gained in handling and storing Acrylonitrile during this period. It should be emphasized at the outset, that because of the toxic and flammable nature of Acrylonitrile, handling operations should be performed in areas which are properly ventilated and free from sources of ignition."

As to cleaning tanks in which Acrylonitrile has been stored, Cyanamid warns:

> "Protective equipment should be made available to those entering [storage] tanks. This equipment should include cover-alls, eye goggles, and gas masks. * * * The person working in the tank should be provided with a body harness with life line attached. Station a man on the outside end of the life line to do nothing but watch the worker within."

And the type of gas mask required differs with the concentration of the chemical's vapors:

> "Use this type of canister (organic vapor) **only** in locations where Acrylonitrile vapor content is less than 2% and the oxygen concentration is above 16%. Otherwise a mask with self contained oxygen or air supply **must** be employed." [Emphasis in original]

Cyanamid is the last to minimize the effects of the chemical on the human body:

> "Acrylonitrile is toxic by inhalation, by absorption through the skin, and by oral ingestion.
>
> "* * *
>
> "Poisoning by Acrylonitrile produces symptoms which are similar to those produced by hydrogen cyanide. Excessive vapor inhalation causes weakness, headache, sneezing, abdominal pain, and vomiting. Absorption of large amounts of the liquid through the skin produces similar symptoms. * * *."

And in describing the proper methods of waste disposal, the manufacturer warns of the danger to fish:

> "Acrylonitrile stream effluents should be treated to such an extent that they pose no danger to downstream public water supplies or to aquatic life. * * * Although it has been demonstrated that fresh-water fish can tolerate an Acrylonitrile level of 10 p.p.m., the actual tolerable limit

The question is not whether BEREAN was at fault in loading Acrylonitrile in skin tanks unprotected by cofferdams. The question is whether Cyanamid knowing what it does, could knowingly load BEREAN at Cyanamid's terminal knowing also that the cargo was going into skin tanks. In this respect Cyanamid had duties that transcended those it owed to Andersen or BEREAN and which, the Court supposes, it perhaps satisfied by showing the Master the blue pamphlet. It owed a duty literally to the world—at least that world within the reach and protection of American jurisprudence, land-based, salt water and amphibious. It had to have in mind port workers at the place of loading, crew members on the carrying vessel, crew members on accessorial tugs, owners and crew members of vessels with which

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will depend on local conditions and use of streams." And if that "aquatic life" happens to be seamen afloat, who will both absorb and breath vapors, "the currently accepted threshold limit for * * * an eight-hour exposure is 20 parts of vapor per million parts of air," which makes it more toxic than carbon tetra chloride (25 p.p.m.) but only slightly less toxic than hydrogen cyanide (10 p.p.m.) Nevertheless, the chemical is toxic enough so that "the regimen of treatment [by a physician] recommended for Acrylonitrile poisoning is that for cyanide poisoning."

In several places and ways the pamphlet equates Acrylonitrile with Hydrogen Cyanide (Hydrocyanic Acid). This is a Class A poison, § 146.25-5, defined as "poisonous gases or liquids of such nature that a very small amount of gas, or liquid, mixed with air is dangerous to life." As such it is listed with only 13 other poisons, three of which are military poisonous gases. And footnote 1 to Hydrocyanic Acid permits dilute solutions not exceeding 5% strength to be classed as Class B poisons. Class B covers "Poisonous liquids or solids * * * other than Class A, C or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation." § 146.25-10. Rat and rabbit ingestion, absorption and inhalation test standards are thereafter prescribed. There is no evidence to refute Dr. Brieger's testimony that Acrylonitrile would fail these tests.

the carrying vessel might come in contact by collision or otherwise, port officials, customs inspectors, immigration officers, maritime service personel, and members of the public. The duties owed to this limitless group of protectees require as a minimum that it not knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid, the manufacturer-supplier-shipper, has the liability of an insurer, but it certainly has the far-reaching awesome liabilities now associated with products liability. *Putman v. Erie City Mfg. Co.*, 5 Cir., 1964, 338 F.2d 911, Restatement, Torts §388. When the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability. Indeed, this teaching of Texas City was not lost to the industrial or judicial world because the Government as the manufacturer of FGAN escaped liability from the peculiar governmental "discretionary function" exemption, *Dalehite v. United States*, 1953, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, . . . . AMC . . . ., or the stringent limitation of the scope of the FTCA to exclude "novel and unprecedented" cases, a reading which was shortly to be repudiated. *Rayonier v. United States*, 1957, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354.

But the trial Judge never really faced up to this issue. Nor does this Court. Rather, each equates Cyanamid's obligations with those the carrying vessel BEREAN owed to others. As to the BEREAN, the Coast Guard regulations, so long as BEREAN did not know they were faulty, were an adequate insulation. But in relation to members of the public and others, Cyanamid could not fall back on the Coast Guard. The problem was really not whether the Coast

Guard classification was in error, as Dr. Brieger tried to demonstrate. Rather, it was what Cyanamid actually knew and ought to have known about its own product and knowing that, what in prudence considering these extremely high hazards could and ought to be done to minimize,[35] if not eliminate, the devastating consequences of a foreseeable casualty.

This was a basic error in approach by the District Judge. And our efforts to overcome the deficiency by questioning the standing of China Union to assert the claim and to hold as a matter of law that there could be no proof of *causation* as to the claims of the injured/deceased will not suffice. We must recall that this case, as are all extensive maritime catastrophes, was being tried in two stages—liability and damages. This is the first time, to my knowledge, for example, in which death certificates, issued generally in Texas by people whose only competence is the lowest office in the judicial hierarchy—prove the cause of death. I agree the issue has not been proved. No more so was the damages sustained by BEREAN or its cargo. That is to come later. As to China Unions' standing, at the liability phase only, who is to say that had the fumes from this lethal cargo not have been freed by rupture of the hull forming the tank sides, the action on RELIANCE might not have been different?

On this record, the Judge should have held that as against Cyanamid a prima facie case had been made out. Cyanamid should have been put to its proof to refute, if it could, the hazardous characteristics, and on what prudence would re-

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35. BEREAN had main tanks 1 through 8 divided by longitudinal bulkheads affording a series of 16 inboard tanks fully separated from the ship's hull by wing tanks on each, port and starboard, side.

quire of the manufacturer-supplier-shipper of a product of such deadly potential.[36] The Judge would then have decided whether Cyanamid had the usual land-based products liability of a chemical manufacturer. If he declared in the affirmative, proof of damages, if any—and I do not minimize the if any—would be opened for a second stage on damages.

The admiralty has led, not followed. But here salt water dilutes the responsibility now so plainly resting on the manufacturer-supplier-shipper of a commercially useful, indeed valuable, chemical compound which carries death with its utility.

I would therefore reverse for further hearing as appropriate on the claims of RELIANCE and her owners, and the injured/decedents against Cyanamid.

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[36] Indeed at this point the Coast Guard regulations might turn on Cyanamid to prescribe an absolute standard. Cf. Marshall v. Isthmian Lines, Inc., 5 Cir., 1964, 344 F.2d 131, . . . . AMC . . . . If, as Dr. Brieger so stoutly maintained, the rat tests prescribed by § 146.25-10(1)(2) (see note 34, supra) would bring Acrylonitrile within Class B poisons, then it is undisputed that for a combustible liquid having lethal characteristics and defined as a Class B or Class C poison, such cargo must be carried in tanks which are independent of the ship's hull, separated by cofferdams, etc. 46 C.F.R. § 39.01-1, .05-1. The significance of such tests would not be to establish that classifying Acrylonitrile as inflammable by the Coast Guard was erroneous as such. Rather, since a manufacturer knows what accepted tests would reveal, the significance would be to forbid the manufacturer as shipper to tender it for shipment without disclosing all these characteristics and to knowingly participate in a loading or shipment which, with such knowledge, it knows to be dangerous. Cf. 46 USCA § 170(10).

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
October Term, 1964

NO. 21367

D. C. Docket Nos. 2018 and 2006-Admiralty

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL, LAN JING-CHAU, ET AL, ARMEMENT DEPPE, S.A., ET AL.,
*Appellants,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Appellees.*

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

### JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the interlocutory *decree* of the said District Court in this cause be, and the same is hereby, affirmed. The motion to strike the brief of Lucy Duncan is denied;

It is further ordered and adjudged that the appellant, China Union Lines, Ltd., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

BROWN, Circuit Judge, concurs in part and dissents in part.

Issued as Mandate: July 27, 1966

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*Of the District Court of Oregon, sitting by designation.

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 21,367

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S.A., ET AL.,
*Appellants,*

vs.

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL.,
*Appellees.*

Appeal from an Interlocutory Decree of the United States District Court for the Southern District of Texas.

(OCTOBER 7, 1966)

ON PETITIONS FOR REHEARING

Before BROWN and GEWIN, Circuit Judges, and KILKENNY*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above styled and numbered cause be, and the same are hereby, denied.

*Of the District of Oregon, sitting by designation..

# APPENDIX D

## DECISION OF DISTRICT COURT

(Caption Omitted)

(Filed July 17, 1963)

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### PRELIMINARY STATEMENT

At approximately 11:15 p.m. on the night of November 7, 1961, the Chinese Motor Vessel UNION RELIANCE and the Norwegian Motor Tanker BEREAN were in collision in that portion of the Houston Ship Channel which crosses Galveston Bay. As a result, twelve lives were lost and certain personal injuries were sustained aboard the UNION RELIANCE. Both vessels were damaged and damage was done to the cargo aboard each vessel.

Both vessels caught fire, though the fire aboard the BEREAN was extinguished within a matter of a few hours. The UNION RELIANCE remained ablaze and at anchor, blocking the Houston Ship Channel at a point close to Buoy No. 73. On November 10, 1961, while still ablaze to such extent that no one could board her, the UNION RELIANCE was towed by the United States Corps of Engineers to Galveston Harbor, where she was anchored.

### THE LITIGATION

Shortly thereafter, the United States of America filed her libel *in rem* against the UNION RELIANCE seeking the immediate sale of the vessel and the recovery of the expenses incurred by the United States in removing her from the Houston Ship Channel and for safeguarding her while at anchorage. Shortly thereafter, China Union Lines,

Ltd., owner of the UNION RELIANCE, filed its petition for exoneration or limitation of liability; and on November 29, 1961, obtained the customary order from this Court prohibiting the prosecution of claims against the vessel or her owner, except in the limitation proceeding.

In connection with its petition to limit, China Union Lines elected to surrender its interest in the vessel and her pending freight to a court appointed trustee. Ben G. Sewell, Esq. was appointed Trustee and entered upon his duties. Upon the recommendation of proctor for petitioner, and a need therefor appearing, the Court appointed J. R. Bencal, a competent and experienced marine surveyor, (and who had been employed in that capacity to represent petitioner's interest from the inception) as salvage master, and authorized such salvage master to undertake the steps necessary to extinguish the fire in the vessel's holds and to bring her into port for the purpose of discharging her remaining cargo preparatory to sale.

Meanwhile, in other procedings in this Court, China Union Lines had filed its libel against the BEREAN. Her owner, A. O. Andersen & Co., Inc., appeared, claimed the vessel, answered and cross-libeled against China Union Lines. The owners and underwriters of the lost and damaged cargo aboard UNION RELIANCE filed their libel against BEREAN and her owners. Similarly, American Cyanamid Company, the owner of the only cargo lost aboard BEREAN, filed its libel against UNION RELIANCE.

The officers and members of the crew of UNION RELIANCE who were killed or injured all were Nationals of the Republic of China. The Consul of that government, residing in Houston, sought to recover for these injuries and deaths, against both vessels. Also killed as a result of

the collision was the Houston Ship Channel Pilot (Captain Duncan) aboard UNION RELIANCE, whose widow, Lucy Duncan, has made claim against UNION RELIANCE and her owners.

Thereafter came several claims by owners of ships which allegedly were delayed by the blocking of the Houston Ship Channel for a period of some two days.

Additionally, China Union Lines, and the owners and underwriters of the cargo aboard UNION RELIANCE and various other parties filed separate libels directly against American Cyanamid, as owner of the cargo of BEREAN. It was the theory of these libels that the acrylonitrile carried by BEREAN, and which had spread, caught fire, and ignited the two vessels, was of such dangerous nature and propensity as to render the owner-shipper liable to the injured parties.

## PRE-TRIAL DEVELOPMENTS

Pursuant to the order of the Court appointing him salvage master, J. R. Bencal, working in close connection with proctor for petitioner, secured equipment and services with which he was able to extinguish the fire aboard UNION RELIANCE. Thereafter she was brought into the port of Galveston, her cargo was discharged, and she was made ready for sale. Under order of Court, the remains of the vessel were sold by the Trustee for a gross price of approximately $109,000.00.

Thereafter application was made to the Court and to the Trustee for the immediate payment from these proceeds of sale for services and materials furnished at the request of the salvage master. Petitioner sought to be reim-

bursed for sums expended in this fashion. The United States sought to recover its expenses in moving and safeguarding the vessel, as salvage claims. The firemen, and those furnishing the equipment used in combating the fire, made similar claims. After one or more hearings with respect thereto, this Court entered an order on March 12, 1962, by which provision was made for their disposition. That order was made the subject of an interlocutory appeal which originally was allowed by the Court of Appeals for the Fifth Circuit. After hearing, however, the order allowing the appeal was vacated and the cause remanded to this Court for further proceedings (306 F.2d 135). Thereafter, extensive hearings again were held by this Court resulting in the order of January 28, 1963, directing the immediate payment of certain salvage claims, and deferring the payment of the remainder of such claims pending a decision on the issue of liability.

This maze of litigation was consolidated, and the pleadings amended so as properly to tender to the Court all issues of liability.

## THE TRIAL

Trial on the issue of liability alone commenced March 11, 1963, and proceeded until April 12, 1963. The Court heard witnesses from among the officers and crews of each vessel, and others, and received voluminous documentory evidence. At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence

produced by petitioner. The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against that respondent.

## FINDINGS OF FACT

*The Vessels and Their Owners*

1. The petitioner in limitation, China Union Lines, Ltd., is a private corporation organized and doing business under the laws of the Republic of China, having its principal office in Taipei, Taiwan.

2. The UNION RELIANCE was a steel motor ship, 496 feet in length, designed for the carriage of dry cargo, built in the United States in 1940. Having served several owners under several flags, she was purchased from Greek nationals by China Union Lines, Ltd., in April, 1961.

3. UNION RELIANCE was one of only four vessels constructed in the same yard and at about the same time, with main engines of this type. She was fitted with four diesels, controlled in pairs, and equipped with electromagnetic couplings, through which the power of either or both pairs, operating either ahead or astern, could be transmitted to the propeller shaft. These engines were designed to give 240 engine revolutions per minute, and, with a 3-1 gear ratio, to give 80 revolutions of the shaft per minute. As will be noted more in detail hereafter, however, by reason of age, wear and poor maintenance, at all times material to this proceeding, the engines were not capable of approaching this efficiency.

To change the direction in which power is imparted to the propeller shaft (that is, if the propeller is driving the vessel forward, and if it is desired to impart astern power), it was necessary to stop the engines by cutting off the fuel supply, to change the cam setting, and to restart the engines.

With all four engines operating at or near design efficiency, one pair of engines normally produced sufficient power, and revolutions of the shaft, for routine harbor maneuvering. Hence the design permitted—and contemplated—one pair of engines to be kept running ahead, and the other pair kept running astern at all times while the vessel was in pilot waters. Thus the engineer could reverse the direction of the screw by a simple maneuver of uncoupling one set of engines, and coupling on the others. When desirable, all four engines could be coupled to the shaft to give maximum power either ahead or astern. This was not a difficult or time consuming operation, and could be accomplished by competent engine room personnel in a matter of approximately one minute.

4. The UNION RELIANCE was equipped with a hydraulic steering system, located in the steering engine room (to be distinguished from the engine room, where the main engines were installed). Hydraulic rams served to move the rudder in the desired direction. Hydraulic fluid (or telemotor oil) under great pressure actuated the rams.

Two separate and distinct steering systems were available to force the hydraulic fluid, under pressure, through the system and against the rams. These were used alternatively; while one was in use, the other served as standby.

The principal component of each such steering system was a large pump. The pump was powered by a 50 horsepower electric motor. There were a number of auxiliary pumps and motors, of particular relevance here being a small so-called "replenishing pump."

In normal operation, hydraulic fluid escaped from the system and was collected in a sump tank. It was then lifted by means of this replenishing pump to an overhead replenishing tank, from which point it was fed back into the system for further use through gravity. The replenishing pump was powered by a one horsepower electric motor.

Some 35 gallons of hydraulic fluid were required to fill each system. While some minor leakage was expected, in normal operation it should have been necessary to add only small quantities of fluid at infrequent intervals.

5. The BEREAN was built in Norway and delivered to her owner and operator, A/S A. O. Anderson & Co., a Norwegian corporation, in April, 1961. She is 508 feet long. 65 feet in beam, powered by one 9000 horsepower diesel engine. She has no midships house; her navigating bridge is in the forward part of the after house, some 350 feet from the bow.

6. The cargo space of the BEREAN is divided into 42 tanks. She is designed and equipped to carry many varieties of bulk liquids. Some tanks are stainless steel lined; others are equipped with heating coils for handling viscous liquids, etc. She had been engaged in the chemical trade during the several months following her construction and prior to the collision, carrying various kinds of petroleum products and other flammable liquids. The shell of the ship constitutes the outer wall of certain of her wing tanks. There were no

protective cofferdams or protective voids surrounding such tanks. Under pertinent Coast Guard regulations, those tanks may not be used to carry "flammable or combustible liquids having lethal characteristics", under 46 C.F.R., Part 39.

*The Cargoes and Movements Preceding the Casualty*

7. Following her purchase from Greek interests, UNION RELIANCE sailed from Piraeus, Greece, through the Mediterranean and to the United States, calling at Tampa, Florida, and New Orleans, Louisiana. By this time her Captain and crew had discovered that extensive repairs were needed in the engine room, the most immediate need being for an overhaul of the engine control mechanism. A marine surveyor and engine expert one Spindanger, together with an officer of petitioner, flew from New York to New Orleans to supervise these repairs. While these repairs to the engine controls were underway, each of the four main engines was opened, and the cylinder heads were found badly worn and eroded. Replacements were not readily available and the old cylinder heads were re-installed. Spindanger made a full report to the owners of the work which he had accomplished, and of other work which he recommended, to place the engine room in proper condition. While the New York office of petitioner was aware of the contents of this report promptly, it was not received in Taiwan until after the collision.

On departing New Orleans, UNION RELIANCE proceeded to Houston, thence through the Panama Canal, up the Pacific Coast, and thence to Japan and Taiwan. Additional engine repairs were accomplished in Taiwan.

Her Captain, chief engineer and others of her complement were replaced, and the officers and crew who were aboard at the time of the casualty took over the vessel in Taiwan. She loaded a general cargo there and in Japan for carriage to the United States. She discharged a part of this cargo at Los Angeles and received aboard at that port five of the large number of piston heads which were needed for her main engines. However, these were never installed prior to the collision. From Los Angeles, she proceeded through the Panama Canal en route to Gulf Ports.

8. The UNION RELIANCE arrived in Houston November 5, 1961, discharged a portion of her cargo and left the Houston dock at 6:30 p.m. November 7. She proceeded seaward, unassisted by tugs, and with Houston Ship Channel Pilot Duncan on her bridge. She was drawing approximately 16 feet 8 inches forward and 23 feet 5 inches aft.

9. At approximately 8:30 p.m., while UNION RELIANCE was in the vicinity of Adams Terminal, she suffered a failure of the starboard steering system which was in use at the time. The engines were stopped, the anchors dropped, and the vessel brought to rest. The starboard steering system was disconnected, and the port system connected. It was tested by turning the wheel a number of times, and the rudder indicator showed that the rudder responded, and that the port system was operating properly. The anchors were lifted and the vessel again got underway. This was at about 9:00 p.m.

Repairs were promptly undertaken on the starboard steering system. It was found that a brush holder on the 50 horsepower electric motor which operated the starboard steering pump was defective. The chief electrician under-

took to repair the damaged part and had done so, but had not replaced the part in the engine. Hence the starboard steering system was not in operating condition from that moment forward.

The UNION RELIANCE proceeded outward from this point with the port steering system apparently functioning properly until shortly before the collision.

10. On November 6, 1961, the BEREAN loaded 14 tons of acrylonitrile at Good Hope, Louisiana. Upon the direction of the officers of the vessel, this shipment was placed in the forwardmost cargo tanks of the BEREAN, being No. 1 port, No. 1 center, and No. 1 starboard.

11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. Acrylonitrile is and was at the time of the casualty classified under pertinent Coast Guard regulations as a Grade C flammable liquid (46 C.F.R. 146.21-100), as is gasoline, benzine, naptha, etc. It is not classified as an "extremely dangerous poison", nor as a "less dangerous poison" (46 C.F.R. 146.25-5; 146.25-10).

12. The BEREAN arrived at the Galveston Bay at approximately 9:15 p.m. on November 7, 1961. In addition to the acrylonitrile mentioned above, BEREAN carried a mixed cargo of bulk liquids. She was drawing 19 feet forward and 25 feet aft. Houston Ship Channel Pilot Lary

boarded the BEREAN in the vicinity of the sea buoy and assumed active control of her navigation as she was proceeding inbound toward Houston.

13. From the sea buoy to the point of the collision and beyond, the Houston Ship Channel passes through the open and unobstructed waters of Galveston Bay. The channel has a dredged width of 400 feet and depth of 36 feet. Crossing Galveston Bay, the channel is relatively straight. When weather conditions are favorable, it is the custom and practice of most vessels to navigate this portion of the channel at "full ahead", except when passing other ships.

From Morgan's Point inward to Houston (being that portion of the channel which the UNION RELIANCE had navigated prior to the collision), the channel is more tortuous; there are many shoreside installations. Thus a vessel is required to maneuver to a far greater extent than in that portion of the channel outward from Morgan's point.

14. During the course of her passage from the sea buoy to the point of collision, Pilot Lary, her second mate (Haugen) and a helmsman were on the BEREAN's bridge at all times. Her captain (Larsen) was on the bridge a majority of the time, although he had repaired to his cabin shortly before the emergency presented itself, and returned to the bridge only moments before the collision. The helmsman was relieved at the wheel every hour on the hour, and it was his duty then to proceed to the bow of the ship to serve as lookout for an hour, before returning to duty at the wheel. However, the practice was followed on the BEREAN, when weather and visibility were favorable and the vessel was pro-

ceeding routinely, to permit the helmsman a 10-15 minute "coffee break" after leaving the wheel before proceeding to the bow. It was during this interval that the emergency arose.

Both bow anchors of the BEREAN were ready to be let go, but BEREAN had no one standing by the windlass to serve as anchor watch. By reason of the nature of the channel in that area, as set out above, it was not customary to have an anchor watch standing by, because normally there was no occasion to use an anchor to maneuver until reaching Morgan's Point.

15. The collision occurred in the Houston Ship Channel at a point between Five Mile Point and Red Fish Reef. At Five Mile Point (Beacons 75 and 76), the Ship Channel requires a turn of about 15 degrees to port from an outbound vessel, as was the UNION RELIANCE. From the point of this bend, to the scene of the collision and beyond, the channel is straight. Buoy 73 is located on the west side of the channel approximately seven-tenths of a mile below Beacon 75. Beacons 71 and 72 are located opposite one another, at a point approximately seven-tenths of a mile below Beacon 73.

16. At 11:00 p.m. on the night of November 7, 1961, in this area the visibility was good, the night clear, with a slight flood tide running, with the wind northerly at approximately 8 miles per hour.

17. UNION RELIANCE was navigating at a speed of 9-10 knots over the ground when she made the bend at Five Mile Point. Each vessel saw the lights of the other at about this time. BEREAN blew a one blast signal, which was not answered by UNION RELIANCE.

18. In negotiating this turn, UNION RELIANCE navigated somewhat to her starboard side of the channel, and away from the center line of the channel. This was noted and commented upon by the pilot of the BEREAN. This maneuver was of little consequence, however, and did not cause the vessel to sheer away from the starboard bank, did not cause loss of control of her steering, and did not precipitate the casualty (as is contended by petitioner).

19. In negotiating the turn in the channel to her port, the UNION RELIANCE pilot ordered her rudder 5 degrees to port. This was at approximately 11:10 p.m. The rudder responded to this movement of the wheel, and the vessel started her turn to port. However, at this point the steering gear of the UNION RELIANCE failed with the rudder in the 5 degree port position, and she continued to swing under that rudder setting. The quartermaster was unable to move the wheel in either direction. She never straightened her course thereafter.

20. When it became evident to the Captain, the pilot, and quartermaster that the wheel would not respond, by engine order telegraph the bridge notified the engine room to reduce speed, and shortly thereafter to stop. The third mate, who was on watch, was ordered by the Captain to search out the chief engineer and advise him of the rudder failure. The engine room was ordered to give full speed astern to the engines.

21. Recognizing the imminent danger, the pilot of the UNION RELIANCE ordered first her starboard anchor dropped, and shortly thereafter her port anchor dropped. At this point (approximately 11:11 p.m.), UNION RELIANCE sounded three blasts on her whistle. This was the only whistle signal sounded by UNION RELIANCE.

22. Efforts to transfer the steering control on the bridge of the UNION RELIANCE from the telemotor system (which had been in use) to the gyro-pilot was unsuccessful, and UNION RELIANCE continued to swing to her port out of control. Prior to the emergency, UNION RELIANCE's four engines had all been coupled in the ahead position for maximum forward speed. On receiving the order for full power astern, the engine room undertook to, and did, reverse one set of two engines, and coupled same to the propeller shaft to give astern power. Nevertheless, the vessel continued in her swing to port with some headway. The remaining two engines were never reversed and coupled to the shaft, for reasons which will be noted hereafter.

UNION RELIANCE continued to have headway until she collided with the port side of the bow of the BEREAN at 11:13-1/2 p.m.

23. The pilot of the BEREAN observed the UNION RELIANCE as she was in the turn of the channel mentioned above, and about 3 miles away. Prior thereto, BEREAN had been navigating at "full ahead" and was making 13 to 14 knots. On observing UNION RELIANCE coming out of the bend, at approximately Beacon 75 and 76, BEREAN's speed was reduced to "half ahead" and shortly thereafter to "slow ahead". It was at this time that the one blast signal was given by BEREAN. While it was not answered, the BEREAN pilot expected to make a normal port to port passing.

The pilot of the BEREAN noted, and comented to the watch officer, that UNION RELIANCE was somewhat closer to her starboard bank of the channel than was necessary or customary in making the bend. They watched her

swing to her port, and became somewhat apprehensive. BEREAN turned slightly to her starboard, expecting to negotiate the port to port passing. However, a three blast signal from UNION RELIANCE was heard, and the sound of the anchor letting go was heard at approximately the same time, and the pilot of the BEREAN imediately recognized that an emergency presented itself. He blew three blasts in return, and immediately ordered full speed astern on the BEREAN's engines and gave her hard right rudder, intending to put her aground in the mud bank at the side of the channel. These orders were complied with. At this time, the vessels were approximately one-fourth mile apart, and were closing on each other.

24. At this time, and since 11:00 p.m., the BEREAN had been without her regular bow lookout. This resulted from the fact that at 11:00 the lookout had returned to the bridge to relieve the seaman at the wheel. The helmsman, before going forward to assume the bow lookout, was directed to fetch coffee for those on the bridge and was engaged in doing so during this interval.

25. The BEREAN had no one standing by to drop her anchors. When the BEREAN pilot recognized the emergency condition of the UNION RELIANCE (when he ordered the engines full astern, the hard right rudder), he likewise ordered the starboard anchor dropped. The watch officer who was on the bridge with the pilot immediately went forward for the purpose of letting go the anchor. However, before he reached the bow, the watch officer felt BEREAN go aground in the mud, and observed UNION RELIANCE bearing down upon the port bow of his vessel in such fashion that he recognized that a collision was in-

evitable. HENCE he did not continue forward, and did not let go the BEREAN anchor, but returned to the bridge.

26. BEREAN ran aground into the mud on her starboard side of the channel immediately before or about the time of the impact. She had little, if any, headway, though the violent wheel maneuver and her efforts to stop caused her stern to swing somewhat to port and across the channel. The bow of the UNION RELIANCE struck BEREAN on her port side somewhat behind her stem. The UNION RELIANCE had lost most of her speed at this time. The impact was not severe, and injured no one. It was hardly felt in some portions of the two vessels. However, the bow of UNION RELIANCE breached the No. 1 port tank of BEREAN, causing its acrylonitrile cargo to become ignited and to explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited. The vessel continued to burn for several days, as noted above, and she became a constructive total loss.

27. As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew.

*Fault and Negligence*

28. The primary and direct cause of the collision was the failure of UNION RELIANCE to keep to her starboard

side of the channel. This resulted from a failure of her port steering system (her starboard steering system having previously failed) and constituted a violation of the provisions of 33 U.S.C.A., Sections 203 and 210. This constituted fault and negligence on the part of UNION RELIANCE.[1]

29. By reason of the extensive damage to the entire bridge, the wheel, and that portion of the telemotor system on the bridge caused by the fire, the cause of the steering failure cannot be determined with as high a degree of certainty as is desired. However, the steering engine room was not damaged. From the evidence which I consider most credible, and the most likely circumstances, it appears, and I find, that the failure of the port steering system resulted from a loss of hydraulic fluid; and the loss of hydraulic fluid, in turn, was caused by the failure of the one horsepower electric motor which powered the replenishing pump for the port steering system.[2]

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[1] There was much testimony on the trial from both sides attempting to explain the movement of UNION RELIANCE to her port and across the channel. Petitioner's theory was that she had approached too close to her starboard side of the channel and, by reason of suction caused thereby, she had sheered to her port; was never able to right herself; and continued the sheer completely across the channel. This is supported by a little more than (1) evidence that she did in fact approach closer to her starboard bank than was customary, (2) a suggestion from the pilot of the BEREAN that this might have caused her to behave in this manner. There is no substantial evidence that this in fact did cause this movement; while there is uncontradicted evidence from all of the officers and members of the crew of UNION RELIANCE who were in position to know, that her steering system failed.

[2] In normal operation, telemotor oil leaks from the main pump into a sump tank. The oil is lifted from the sump tank to an overhead tank, from which it again goes into the system by gravity flow. Thus, if the replenishing pump is not operative (or if the electric motor which powers it is not operative) in a matter of a few hours the oil in the system is exhausted, the system be-

30. The failure of the small motor powering the port replenishing pump was due to the fact that a fuse was burned out in the electrical lines serving that motor. This occurred in all probability when the port steering system was put in operation following the original steering failure at about 9:00 p.m. This resulted from the fact that the chief electrician made use of a certain wooden block to circumvent the safety and protective feature of an electric solenoid in the electrical system serving this motor.[3]

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comes filled with air, and the rams do not cause the rudder to respond.

This explanation is strongly supported by the uncontradicted testimony that on the occasion of the joint survey the port system was practically devoid of hydraulic fluid, and when power was applied, moved erratically, if at all; but that after some 30 to 35 gallons of telemotor oil was added, it operated properly. I am convinced that this loss of fluid resulted prior to the collision and was the cause of the steering failure. I am unable to accept the explanation offered by petitioner that the oil leaked out after the collision and before the survey.

[3] As in the preceding finding, the evidence does not conclusively show the cause of this failure. I credit, however, the following testimony.

Shortly before or in the course of the joint survey, a fuse was found to be burned out in the electric circuit which controlled the one horsepower motor serving the port replenishing pump. There is no direct evidence as to when the fuse was blown. However, from the time the vessel was received from its Greek owners, the chief electrician had made use of a wooden block to prop and secure in place an electric solenoid in the electric circuit serving this motor (another block was used in a similar fashion in another line). This solenoid was designed to protect the motor from the full surge of electrical current when the motor is switched on, and to permit the current to be applied gradually. If an unduly heavy surge of current passed through the line, the solenoid was designed to drop open, breaking the circuit, and protecting the motor. The wooden block held the solenoid in place and thus rendered the protective feature inoperative. This was

31. The owners of UNION RELIANCE were at fault and negligent in failing to have had a careful and complete inspection of her steering system prior to the collision. Such an inspection no doubt would have disclosed the use of the wooden blocks, excessive leakage and loss of large quantities of telemotor oil (another possible cause of the casualty), and perhaps other difficulties. In view of the knowledge which the owners had even before accepting delivery of UNION RELIANCE that her main engine room was in a deplorable state from age, excessive wear, and inadequate maintenance; and of the almost con-

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calculated to cause a blown fuse when this motor was engaged. Had this occurred at about 9:00 p.m. and the system not been replenished with hydraulic fluid, the fluid well might have been exhausted, and the system inoperative, by 11:00 p.m.

This testimony as to the blown fuse came from the witness J. R. Bencal and the following circumstances surrounding this testimony should be noted. Mr. Bencal is a recognized and, I believe, highly regarded marine surveyor in the Port of Houston. As stated earlier herein, he was employed almost immediately following the casualty by the petitioner and undertook to represent petitioner's interest throughout. He was in charge of the team of surveyors representing petitioner at the joint survey (which included Spindanger, an expert on the main engines, and Tarabochia, an expert on hydraulic steering systems). As stated heretofore, Bencal was appointed by the Court as salvage master at petitioner's suggestion, and by reason of his services in this regard in extinguishing the fire, his early examination of the vessel and her cargo, he was probably more familiar with the situation which prevailed aboard UNION RELIANCE following the casualty than any other individual. He was not called as a witness by petitioner. When he likewise was not called as a witness by the respondents (who obviously were fearful of being bound by his testimony), the Court summoned Bencal as a witness and advised all parties that they might cross-examine, and not be bound by his testimony. It was he alone who has testified as to the blown fuse of the electric motor mentioned above. As his memory had been refreshed from notes made at the time and the report written to his principals shortly after the joint survey, I find no reason why his testimony on this point should not be accepted.

stant difficulties encountered with the main engines, a prudent owner would have anticipated difficulties in the steering system, and would have taken steps to protect against their malfunction.

32. The UNION RELIANCE was unseaworthy from the inception of the voyage in which she was engaged, by reason of the incompetence and inability of her Captain, chief engineer, and other crewman to operate and maneuver UNION RELIANCE properly, efficiently, safely, or within her full potential. Specifically, I find that neither the Captain nor chief engineer was aware of the fact that all four of her main engines might be coupled astern. There was no agreed signal whereby the bridge could order the engine room to couple all four engines astern. By reason of this lack of knowledge, only half of the potential backing power of UNION RELIANCE was applied in an effort to stop her forward movement before the collision. Additionally, the Captain was unaware that reverse power might be applied in a very short time (probably a matter of one minute) if the engine room crew operated efficiently.[4]

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[4] It is clear from the evidence that neither the Captain nor the chief engineer was aware that the four engines might all be coupled astern, and thought that only two might be so utilized. Spindanger testified that at the time of the repairs at New Orleans on her first voyage, he had explained fully to the engineering officers and crew how to change the engines from ahead to astern; how all four engines might be so utilized; and that the whole operation would take probably one minute. The Captain and chief engineer of that voyage were relieved in Taiwan, and replaced by Captain Shu and chief engineer Hsu Bah. The new chief engineer had never before sailed on a vessel with a similar four-engine arrangement, and had received instructions from his predecessor only during the course of a one day voyage.

On entering the Houston Ship Channel some three days before the accident, the Captain told Houston Ship Channel Pilot Collie

33. UNION RELIANCE was at fault in failing to make use of all four engines in going astern immediately prior to the collision. Had the additional astern power been applied, it is highly likely that the collision would have been avoided.

34. The telephone communication system between the bridge, the engine room, steering engine room, etc. aboard the UNION RELIANCE was inoperative. While the bridge might give signals to the engine room by means of the telegraph, there was no other means of communication except (as was done shortly before the collision) to send a messenger, or to station a man with a megaphone midway between the bridge and steering engine room, to relay messages. This obviously made the transmission of messages more difficult and slow, and decreased the efficiency of the vessel.

35. The fault and unseaworthy condition referred to in the preceding paragraphs were the result of petitioner's failure to exercise due diligence to make the UNION RELIANCE seaworthy, and the failure to equip her with a competent and experienced crew. The collision and losses resulting therefrom were occasioned with the privity and knowledge of petitioner.

36. The BEREAN was at fault in failing to have a lookout on the forecastle head from 11:00 p.m. until the time of the collision. On most careful consideration, I find that

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that if all four engines were hooked up ahead (as was done to get maximum speed and power in crossing the Galveston Bay portion of the channel), it would require 10 to 15 minutes before any astern power could be applied. Shortly before the collision, the Captain told Houston Ship Channel Pilot Duncan that about 10 minutes would be required to give astern power when the four engines were coupled ahead.

this failure did not, and could not have caused or contributed to the collision. This is so because Pilot Lary saw the UNION RELIANCE several miles away; observed her lights constantly thereafter; and by reason of his knowledge of and familiarity with the channel, he recognized that she was in difficulty at the earliest moment which circumstances permitted. He heard the only whistle signals given by UNION RELIANCE, and took immediate action. A lookout could have done nothing more.

37. I find that BEREAN took every reasonable means to avoid the collision after her pilot became aware of the danger.

38. BEREAN was not negligent or at fault in traveling at the speed which she was making prior to the time that she observed UNION RELIANCE and slowed her speed for the anticipated passing.

39. BEREAN was not at fault in failing to have an anchor watch prior to and at the time of the collision. It is not the custom of ships to maintain an anchor watch in this portion of the channel, particularly when the vessel has sufficient power to maneuver readily. Additionally, I find that had the anchor of BEREAN been dropped when her pilot ordered, it would have had little, if any, effect in slowing the vessel under the circumstances which then prevailed, and would not have averted the collision. BEREAN took the quickest and most certain method of losing her headway by running aground.

40. BEREAN was not at fault in carrying acrylonitrile cargo in her forward wing tanks. She violated no Coast

Guard regulation by doing so, and I find this was not a negligent or careless manner of loading.[5]

41. BEREAN was not at fault in failing to go to port to undertake a starboard to starboard passing. She had no reason to anticipate that such a maneuver might be called for until long after the time had elapsed within which such passing might have been accomplished safely, if at all.

42. The Captain and chief engineer of UNION RELIANCE were negligent by reason of their failure to familiarize themselves with their vessel and her engines and their failure to make proper use thereof prior to the collision. This negligence constituted a proximate cause of the collision. Any recovery in favor of the Captain and chief engineer will be reduced by fifteen per cent (15%).

43. The chief electrician of UNION RELIANCE was guilty of negligence in failing properly to inspect and maintain the electrical equipment and circuits in the steering engine room of his vessel. This constituted a proximate cause of the collision. Any recovery in favor of the chief electrician should be reduced by twenty-five per cent (25%).

44. The services rendered to the UNION RELIANCE while she was at anchor in Bolivar Roads, and subsequent thereto, by the United States were, in the light of circum-

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[5] While petitioner offered evidence tending to show that a greater safety factor would result if there were inner lining of the tank so that an air space was maintained between the skin of the ship and the outer wall of the wing tanks, these experts conceded that it was the custom and practice to carry gasoline and other inflammable and explosive liquids in tanks immediately adjacent to the skin of the ship.

stances then existing, reasonable and necessary; and the charges made therefor reasonable in amount and consistent with charges generally made for similar services in that vicinity.

45. Certain speed and performance tests were made of the BEREAN shortly prior to the trial. The purpose was to show how she would react under conditions similar to those which existed at the time of the collision. The tests were made in the area in which the collision occurred. Evidence of these tests was received subject to objection. On careful consideration, I am of the view that these tests were not made with a sufficiently high degree of accuracy, and were not sufficiently consistent within themselves, to be of any probative value. Hence this evidence has not been considered.

46. From the foregoing findings, it is apparent that in general the Court has adopted the theory and the contentions of BEREAN, and rejected those of UNION RELIANCE. It is felt that the foregoing findings are supported by a clear preponderance of the evidence. It should be noted, however, that on many of the issues the evidence is in sharp and irreconcilable conflict. In weighing the evidence, notice was taken of the fact that several of the principal witnesses of petitioner were impeached regarding matters of great importance. Note is made of the following examples:

(a) Some 48 hours following the collision, as the senior surviving and uninjured officer of UNION RELIANCE, the third mate was directed to prepare a report of the casualty for his company. He did so in longhand. While the Captain was hospitalized with

severe burns, this report was read to him and received his tacit, if not express, approval and in due course was forwarded to the company. In early pre-trial procedures when extensive exchange of documentary evidence between the parties was had, this report was withheld by petitioner. It was only after trial had begun, and after strenuous efforts by proctor for petitioner, that this document was secured from Taiwan. I am of the view that it was deliberately withheld. This report was inconsistent with the theory advanced by UNION RELIANCE in a number of important respects.

(b) At the original Coast Guard hearing, a few days following the casualty, the chief engineer of UNION RELIANCE testified that his vessel had been using only two engines in running ahead, with two engines standing by to use for astern power. Thereafter the engine room bell book was recovered which showed to the contrary. He changed his testimony thereafter.

(c) The explanation of the chief electrician of UNION RELIANCE regarding his use of the wooden blocks in the starter boxes was entirely unsatisfactory. This is particularly so as he testified that the block in question controlled the replenishing pump motor on the *starboard steering engine* (which, of course, was not in use immediately prior to the collision). Testimony of all the surveyors showed conclusively that it controlled the replenishing pump motor on the *port* steering engine.

## CONCLUSIONS OF LAW

1. This Court is vested with jurisdiction of these proceedings.

2. Petitioner China Union Lines, Ltd. is not entitled to exoneration from or limitation of its liability with respect to the claims made against it.

3. The UNION RELIANCE was grossly at fault, and in violation of the statutes mentioned above, and she and her owners are held solely responsible.

4. The only fault of the BEREAN having been one which did not and, under the circumstances, could not have contributed to the collision, A/S Andersen & Co., and the BEREAN *in rem* are not liable to any of the libelants who have made claims against them, and are exonerated and freed of liability in these actions.

5. China Union Lines, Ltd. is not entitled to recover any expense from its cargo as general average.

6. China Union Lines, Ltd. is liable to American Cyanimid Company for loss of its cargo aboard the BEREAN.

7. China Union Lines, Ltd. is liable to Lucy Duncan, surviving widow of Houston Ship Channel Pilot Duncan, for his death resulting from the fault and negligence of petitioner.

8. China Union Lines, Ltd. is liable to the legal representatives or next of kin of the members of the crew of UNION RELIANCE who were killed as result of the casualty; and to those members of the crew who received personal injuries or loss thereby, subject to the reduction by reason of their own negligence as set out in the preceding findings.

9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States.

Done at Houston, Texas, this 17th day of July, 1963.

BEN C. CONNALLY
Ben C. Connally
United States District Judge

## APPENDIX E

R. 3454, 3455 (Oral Ruling of the Court, April 4, 1963)

. . .

"As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way the BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Anderson, and not of the shipper.

"The motion of the BEREAN and of Anderson for judgment on the case in part is denied. I don't feel that the case against Anderson and against the BEREAN can be separated and divided in the fashion that counsel apparently considers. I think the fact that she was loaded with a dangerous cargo very well might be a consideration in determining whether her speed was excessive, or whether the anchor should or should not have been dropped, and things of that sort; hence the motion of Anderson and the BEREAN for judgment at this time is denied."

. . .

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IN THE

# Supreme Court of the United States

October Term, 1966

NO. 927

CHINA UNION LINES, LTD., MITSUBISHI INTERNATIONAL CORPORATION, ET AL., LAN JING-CHAU, ET AL., ARMEMENT DEPPE, S. A., ET AL., *Petitioners,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

NO. 933

CHINA UNION LINES, LTD., *Petitioner,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

NO. 934

LAN JING-CHAU, ET AL., *Petitioners,*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR A. O. ANDERSEN & CO., AS RESPONDENT, IN OPPOSITION

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IN THE

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR A. O. ANDERSEN & CO., AS RESPONDENT, IN OPPOSITION

## I.

## STATEMENT OF THE CASE

Despite their bulk the Petitions of these Petitioners only reiterate their factual arguments as to why they should prevail, and for the reasons previously set forth so fully

and completely, both by the Trial Court and the United States Court of Appeals for the Fifth Circuit, Respondent, A. O. Andersen & Co., respectfully prays that all Petitions for Writ of Certiorari be denied.

In a maritime tragedy of considerable complexity occurring in the Houston Ship Channel on the night of November 8, 1961, the Norwegian Tanker M/V BEREAN which had gone aground on her side of the channel in a futile attempt to avoid collision was struck and holed somewhat behind her stem by the outbound M/V UNION RELIANCE which had swung to its port side of the channel out of control as a result of a steering gear failure. The vessels caught fire, and heavy loss of life, severe personal injuries and property damage ensued.

The litigation was extensive with numerous actions and cross-actions being filed on behalf of the two vessels, their respective cargoes, the Houston Pilot conning the M/V UNION RELIANCE who lost his life and some of the Chinese crew members. After an extensive trial which lasted approximately a month, the Trial Court assessed sole fault for the casualty against the M/V UNION RELIANCE and its owners and denied their Petition For Exoneration From or Limitation of Liability. In detailed Findings of Fact and Conclusions of Law entered by the Trial Court, the M/V BEREAN and its owners, A. O. Andersen & Co., were exonerated from any fault contributing to the collision, having taken every reasonable means to avoid the casualty after her pilot became aware of the danger. The Court specifically found that the M/V BEREAN was not at fault and that it violated no statute or Coast Guard regulations in loading and carrying acrylonitrile in her forward wing tanks. (Trial Court Finding of Fact No. 40). Recovery against China Union Lines was

decreed in favor of all of those litigants who sustained material losses as a result of the casualty including Mrs. Lucy Duncan, surviving widow of Houston Ship Channel Pilot Duncan, the legal representatives or next of kin of the deceased members of the M/V UNION RELIANCE and those members of the crew who received personal injuries or loss thereby, American Cyanamid Company as owner of the cargo on board the M/V BEREAN, Mitsubishi International Corporation, et al, as owners of the cargo on the M/V UNION RELIANCE, and the United States of America for expenses incurred in clearing the Houston Ship Channel following the casualty.

Dissatisfied with the result obtained in the Trial Court, China Union Lines appealed to the United States Court of Appeals for the Fifth Circuit, being joined by Mitsubishi, the Consul General of the Republic of China on behalf of the injured and deceased Chinese seamen and Armement Deppe, S.A., which had failed to sustain its detention claim against the M/V BEREAN. Again, after an exhaustive review of the extensive record of the trial, the three Circuit Judges were unanimous that the Trial Court's Findings of Fact and Conclusions of Law as to the cause of the collision were eminently correct and that the M/V BEREAN and its owner, A. O. Andersen & Co., were not at fault. Although one of the Court dissented in part, believing that the case should be reversed and remanded as to some parties for further evidence as to the role acrylonitrile played in the loss of life and personal injuries suffered by those on the M/V UNION RELIANCE, the majority opinion minutely analyzed this phase of the record (China Union Lines Petition, Appendix A, pp. 40-42) in the light of the Trial Court's actions and properly concluded that they fully supported the Findings of Fact and Conclusions of Law ultimately entered.

## II.

## QUESTIONS PRESENTED FOR REVIEW

Despite the multiplicity of parties, the voluminous record of fourteen printed volumes totaling 5,276 pages and the numerous issues raised by Petitioners as constituting a basis for review, there emerged certain fundamental considerations that capsule why these Petitions for Writ of Certiorari should be denied.

The case turned in its every aspect purely upon fact findings of fault in a specific ship collision. Certainly, none of the criteria listed in this Court's Rule 19 are remotely involved, nor would this Court's review of the record and opinion as to the facts it presents be of any special value to pending or future litigation.

As both the Trial Court and the Court of Appeals concluded without the slightest reservation, the sole reason for the collision and all resulting damages was the unseaworthiness of the M/V UNION RELIANCE and the gross negligence of its officers and crew. It thereafter followed as the night the day that China Union Lines was to be held solely liable for all damages without limitation. A review of the Trial Court's Findings of Fact and Conclusions of Law as well as the opinion of the Court of Appeals reveals the thoroughness with which both Courts combed the record prior to reaching their respective decisions, a record which contained no new questions of law, but only extensive issues of fact.

All aggrieved parties have been awarded full recovery against the vessel owner, China Union Lines, which currently owns and operates seventeen vessels that frequently touch at United States ports according to Lloyds' Register.

Such adjudication applies equally to the other two Petitioners, Mitsubishi International et al, owners of the cargo on the M/V UNION RELIANCE, and Lan-Jing-Chau, et al on behalf of the Chinese seamen. Petitioner China Union Lines is distressed with the inevitable conclusions reached by two Courts on these collision facts, but this constitutes no valid basis for prolonging this already lengthy litigation by attempting to implicate innocent parties to share the losses occasioned solely by the faults and unseaworthiness of the M/V UNION RELIANCE.

Respondent A. O. Andersen & Co. respectfully submits that the Court of Appeals was correct in concluding that each of the parties received a fair and impartial trial and that the Trial Court's findings were amply supported by substantial evidence contained in the record. There is no conflict with a decision of another Court of Appeals, nor is this decision in conflict with Federal Law or with applicable decisions of this Court.

## III.

## CONCLUSION

The Petitions for Writ of Certiorari should be denied in their entirety.

Respectfully submitted,

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NO. 933

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD.,, MITSUBISHI INTERNATIONAL CORPORATION, ET AL, LAN JING-CHAU, ET AL, ARMEMENT DEPPE, S.A., ET AL, *Petitioners*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL, *Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**On Behalf of Respondent, Lucy Duncan, As Independent Executrix, Widow, and Sole Beneficiary, of Houston Pilot, D. O. Duncan, Deceased**

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 264 F.2d 769 and 1966 AMC 1653. That opinion is further set out as Appendix A to Petitioner, China Union Lines, Ltd'd. Petition herein.

The opinion of the District Court is reported at 222 F. Supp. 874 and 1965 AMC 901. That opinion is also attached as Appendix D to Petitioner, China Union Lines, Ltd's. Petition herein.[1]

## QUESTIONS PRESENTED FOR REVIEW AS MAY PERTAIN TO RESPONDENT, LUCY DUNCAN

Respondent Lucy Duncan, is the widow and sole survivor of Houston Pilot, D. O. Duncan. Pilot Duncan lost his life on November 7, 1961, while assisting in the navigation in the Houston Ship Channel of the Petitioner, China Union Lines, Ltd's. vessel, UNION RELIANCE.

Three separate Petitions for Writs of Certiorari to the Court of Appeals below have been filed with this Honorable Court. Each of the petitioners had an interest in the UNION RELIANCE. Petitioner, China Union Lines, Ltd. was the owner and operator of the vessel. Petitioners, Mitsubishi International Corporation, et al, were the owners or undewriters for damaged or destroyed cargo carried on board the UNION RELIANCE.

Petitioners, Lan Jing-Chau, et al, are the officers and seamen (or their legal representatives) who were injured or lost their lives as a result of the collision.

The petitions of each of the petitioners are somewhat overlapping to the extent that they each seek review of the decisions of the Courts below exonerating the BEREAN

1. An earlier opinion of the Court of Appeals is reported at 306 F.2d 135 and 1963 AMC 1426. The Appeal was from an Interlocutory Decree and involved a District Court Order concerning the Limitation Fund. Respondent, Lucy Duncan, was an Appellant. In view of the later denial by the District Court and Court of Appeals of limitation of liability to Petitioner, China Union Lines, Ltd., hopefully, questions there raised have become moot.

and its owners, Respondent, A. O. Andersen & Co. and the owner of cargo carried on board the BEREAN, Respondent, American Cyanamid Company.

Respondent, Lucy Duncan has no direct interest in questions concerning the alleged liability of Respondents, A. O. Andersen & Co. and American Cyanamid Company.[2] However, Respondent, Lucy Duncan, to the extent permissible, must oppose the granting of any petition for writ of certiorari which would further delay the granting of Final Judgment in her behalf.[3]

Petitioner, China Union Lines, Ltd. admits its liability in its Petition for Writ of Certiorari. It admits that the UNION RELIANCE was on the wrong side of the Houston Ship Channel. It admits that its officers and crew were negligent. Therefore, as to this Respondent, Lucy Duncan, it would appear that the only question to which we should direct our attention would be Petitioner, China Union Lines, Ltd's., question No. 6, presented at page 6 of its Petition, as follows:

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2. Respondent, Lucy Duncan, did not bring suit against the BEREAN or its owners. She did file suit in the District Court against American Cyanamid Company. However, after having heard the evidence before the District Court, Respondent, Lucy Duncan, did not believe that liability of American Cyanamid Company could be established. Having obtained a Decree of Liability for her damages from Petitioner, China Union Lines, Ltd. (as also did Petitioners, Mitsubishi International Corporation, et al, and Lan Jing-Chau) Respondent, Lucy Duncan, did not perfect an Appeal as to liability of Respondent, American Cyanamid Company.

3. Mrs. Duncan has a stipulation as to damage in the amount of $125,000.00 with Petitioner, China Union Lines, Ltd. See, Appendix "A" attached hereto. Over five years have elapsed from the date of the disaster. Of this time, almost three and one-half years have been spent on Appeal of the District Court's Interlocutory Decree of Liability in favor of Mrs. Duncan. At the time of her husband's death, Mrs. Duncan was fifty-four years of age. She will soon be sixty years of age.

"The primary and direct cause of a collision between two ships is found to be the failure of the steering system of one caused by negligence of the ship's electrician. A contributing cause was found to be using only two instead of the ship's four engines to go astern after the steering failed. The owner was denied limitation of liability for failure to instruct the Master and Chief Engineer on the use of four engines, and in thus manning the ship with an incompetent crew.

Can an owner be charged with privity and knowledge of the crew's negligence found to have caused a collision, on the ground that he should have instructed fully licensed officers of many years' experience about matters of ship operation which they testified they were well aware of and which licensed officers were bound to know?"

We respectfully urge that if this question is not to be reviewed by the Court, then the Petition for Writ of Certiorari, as to Mrs. Duncan, should be denied without regard to other questions which have been raised by the various Petitioners.

## STATEMENT OF THE CASE

The tragedy of the UNION RELIANCE did not begin with the collision on November 7, 1961. It even had its inception long before the purchase of the vessel by Petitioner, China Union Lines, Ltd. in April and May of 1961.

The vessel was originally built in the United States in 1940. She was christened the USS MORMACLAND. She was a dry cargo vessel with a C-3 type hull (Vol. V—R.1659). She was not a smaller "C-2" type vessel as indicated by Petitioner, China Union Lines, Ltd. at page 22 of its Petition.

The main propulsion system originally installed was still in use on November 7, 1961, even though the ownership, character and service of the vessel had been altered many times.

The main propulsion system consisted of four Busch-Sulzer diesel engines designed to deliver, in combination, a *service speed* of 16.96 knots at 80 rpms. (Vol. V—R.1661).

C-3 type vessels were powered by more efficient steam turbines *with the notable exception of the UNION RELIANCE and three sister ships.* Of these four C-3 vessels powered by four diesel engines, only the UNION RELIANCE was known to still be in operation on the date of collision. (Vol. VIII—R.2978-2980).

The original dry cargo ship, the USS MORMACLAND, was lend-leased to the British, who converted her to a small aircraft carrier, the HMS ARCHER. She was then reconverted to a dry cargo ship under British Registry and renamed the EMPIRE LAGAN. Thereafter, she was converted to a passenger ship of Swedish Registry and renamed the ANNA SALEN. Then, while still in passenger service, she was sold to Greek owners and renamed the TASMANIA. Finally, in April and May of 1961, she was sold to Petitioner, China Union Lines, Ltd. for its use as a dry cargo ship. This was approximately six months before the disaster. She was renamed the UNION RELIANCE. (Ship's Particulars—Ex. P-25-I, received in evidence at Vol. V—R.1658-1662).

At the time of the vessel's purchase, Petitioner, China Union Lines, Ltd's. representative, Mr. King, went to Greece to inspect the vessel. The purchase contract had already been signed.

Mr. King wrote to Petitioner, China Union Lines, Ltd., describing the horrible state of the vessel's engine room and main engines. The only comfort he could give was, that with so many engines, even in their bad condition, it was unlikely that all four would stall at one time. (Ex. P-25-A-1, 2 and 3, received at Vol. VIII—R.2816; also R. 2816-20).

Although it never publicly admitted to the poor condition of the vessel, Petitioner, China Union Lines, Ltd. did complain of the unfair purchase survey by the Lloyds surveyor at Pireaus. The survey was claimed to be biased in favor of the local Greek owners (Vol. VIII—R.2839-40).

Although the vessel was partially surveyed by Bureau Veritas at Pireaus for Petitioner, China Union Lines, Ltd., the steering engine room was not surveyed because it was locked (Ex. P-25-D, received in evidence at Vol. VIII—R.2831). No further effort to survey the steering system was made by Petitioner, China Union Lines, Ltd. and the only inspection made by it consisted of determining that the rudder would move (Vol. VIII—R.2831-2).

The Taiwan officials of Petitioner, China Union Lines, Ltd., claimed to have thought that their Mr. King was exaggerating. Therefore, they decided to await further reports from their crew which was dispatched to Pireaus to take over the vessel (Vol. VIII—R.2843).

The new Master (Captain Fan) and Chief Engineer (Mr. Han) who brought the vessel back to the United States and finally to Taiwan, were the immediate predecessors of Petitioners, Captain Hsu and Chief Engineer, Dah. The latter are the Master and Chief Engineer involved in this litigation.

Captain Fan and Chief Engineer Han, were appalled by the state of mechanical repair of the vessel. Captain Fan even recommended that the Lloyds surveyors be sued (Ex. P-25-P-1, received in evidence Vol. VIII—R.2845; Ex. P-25-Q-1 at R.2849).

Shortly after sailing from Pireaus Captain Fan cabled to Petitioner, China Union Lines, Ltd., as follows:

> ". . . all parts un-normal . . . accidents will seriously expected in maneuvering . . ." (Ex. P-5-M-2 at R. 2855).

Yet under these conditions, the vessel carried cargo to the United States, urged by Petitioner, China Union Lines, Ltd., to ". . . do utmost to maintain engine and speed . . ." (Col. VII—R.2856). The vessel first discharged cargo at Tampa. It then proceeded to New Orleans where the main engine control system was reworked. Some of the needed repairs and reconditioning of the main engines were also performed. After reworking of the engine controls, the vessel was capable of switching from four engines ahead to four engines astern in one minute, *if operated properly.* (BEREAN Ex. 56, received at Vol. VIII—R. 3180; Ex. P-25-J at R.2863; also, testimony at Vol. IX—R.3229-3230).[4]

From New Orleans, Captain Y. H. Chan (Petitioner, China Union Lines, Ltd's. Port Captain) cabled to Taiwan:

> ". . . above repairs absolute minimum for vessel operations. Making every effort postpone remaining re-

4. It is to be noted at R.3229, that Surveyor Spindanger carefully explained the procedures for reversing all four engines to former Chief Engineer Han. This information was never passed on to his successor, Petitioner, Mr. Dah.

pairs Far East or after date . . ." (Ex. P-25-Q-2, received at Vol. VIII—R.2860).

Even after New Orleans repairs, the main engines were still in urgent need of at least fourteen pistonheads. The number four main engine[5] was made a special receptacle for worn-out and homemade parts that had not been replaced (Vol. IX—R.3263).

The UNION RELIANCE limped to Japan and then finally home to Taiwan. All the while she was carrying cargo.

At last, at Taiwan, Petitioner, China Union Lines, Ltd., would surely make the thorough inspections necessary, carry out extensive repairs, and fully advise the new Master and Chief Engineer (Petitioners, Captain Hsu and Mr. Dah) as to how to operate the vessel. Instead it almost literally, walked around, kicked the tires, honked the horn and decided that the vessel was ready to continue to earn its keep.

On August 22, 1961, the new Chief Engineer, Petitioner, Mr. Dah, boarded the UNION RELIANCE (Vol. VI—R.2167). His previous experience as a Chief Engineer on ocean going vessels[6] was limited to 1½ years on the UNION PIONEER, which had one engine (R.2167; 2204) and 1 month on the UNION CAPITOL, which had one engine (R.2167; 2204). The UNION RELIANCE was his first ship with four engines (R.2204).

Petitioner, Mr. Dah, spent one day with Chief Engineer Han, who had brought the vessel from Greece (R.2204).

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5. One of the two engines used for backing power.

6. He had served on a Chinese Customs ship which had two engines (R. 2166; 2204).

Chief Engineer Han did not tell him of any previous difficulties with the engines (R.2204-6). Petitioner, China Union Lines, Ltd., did not tell him about previous difficulties, the need for parts or furnish him with any of the reports which it had received (R.2206-8). He *never* knew that all four engines could be run astern (R.2210-15).

On August 23, 1961, the new Master, Petitioner, Captain Hsu, boarded the UNION RELIANCE (Vol. IV—R.1494; Vol. V—R.1567). The UNION RELIANCE sailed under his command on August 27, 1961 (Vol. V—R.1567). Neither the former Master, Captain Fan or the Marine Superintendent of Petitioner, China Union Lines, Ltd., told him of any previous difficulties (Vol. V—R.1567-8).

Petitioner, Captain Hsu, received only general information from the former Master, Captain Fan, concerning the operation of the vessel's engines (Vol. V—R.1652-4). Petitioner, China Union Lines, Ltd., gave him no instruction as to the operation of the engines (R.1652) even though the UNION RELIANCE was the only four engine vessel it had ever owned (Vol. V—R.1568-9; Vol. VI—R.2204). His only information on utilization of the engines came from the former Greek owners and their log books (Vol. X—R.3816).

Petitioner, Captain Hsu, admitted that four engines astern would give additional power (Vol. X—R.3814), however, he *never* knew that four engines could be used astern (Vol. V—R.1652-4; Vol. X—R.3814-8).

Petitioner, Captain Hsu, was in the steering engine room only one time before the collision and then the vessel was docked and the steering engines were not operating (Vol. IV—R.1572-3).

Petitioner, China Union Lines, Ltd's., Mr. Muh was in charge of the UNION RELIANCE at Taiwan. He was the only witness produced by Petitioner, China Union Lines, Ltd., as to its diligence, lack of privity and knowledge.

Mr. Muh considered all reports concerning mechanical difficulties and needed repairs to have been *exaggerated* (Vol. VIII—R.2843-5).

Mr. Muh had had no experience with a vessel powered by four engines, but as far as he was concerned, ". . . it really does not matter whether she has four, two or one engine" (Vol. VII—R.2932). He did not feel that it was necessary to give any instructions or training to engineering personnel (R.2932).

Mr. Muh testified that one 55 gallon drum of telemotor oil should last a year or more (Vol. VIII—R.2898). One extra drum was on board when the vessel was purchased from the Greeks. He approved purchase of two drums at Tampa and another two drums at New Orleans. Mr. Muh ". . . thought it was rather strange . . ." (Vol. VII—R.2899). Later, when Mr. Muh was inspecting the vessel at Taiwan, he only looked into the steering engine room to see if the rudder moved when the wheel on the bridge was turned. No examination of the steering engines or electrical equipment was made in spite of his prior knowledge that the consumption of telemotor oil was excessive (Vol. VII—R.2783-4).

Thus, manned, equipped and repaired, the UNION RELIANCE sailed (again with cargo) from Taiwan for Los Angeles, Houston and her destruction.

Only four hours out of Keelung, her number three main engine failed and was inoperative all of the way to Los

Angeles (Vol. IV—R.1541). In one thirteen-day period alone she had ten fires in her main engines' exhaust manifolds. These fires continued even after supposed repairs (Engine Log—Ex. P-7, admitted at Vol. VI—R.2170).[7]

The vessel arrived at Galveston Bar inbound toward Houston on November 5, 1961. Houston Pilot, Captain Collie, conned the vessel to Houston. He was advised by the Master, Petitioner, Captain Hsu, that the vessel would make a top speed in open waters of only 11 knots with all four engines on the shaft running at *full ahead*.[8] Petitioner, Captain Hsu, told Pilot Collie that it would take thirty (30) minutes to change one set of engines from ahead to astern for astern power (Vol. VII—R.2742, 3).

Two days later, on November 7, 1961, while sailing outbound from Houston, the vessel's starboard steering engine failed at approximately 9:00 P.M. (Vol. IV—R.1510-11). The vessel's port steering engine or portions of the system apparently failed at approximately 11:10 P.M. (Vol. IV—R.1527 and R.1530), a few minutes before the collision.

Pilot Duncan was burned beyond recognition in the fire that followed the collision.

On November 10, 1961, Petitioner, China Union Lines, Ltd., libeled the BEREAN and its owners, Respondent, A. O. Andersen & Co. In its Libel it stated, under oath, that there was *no* ". . . fault or neglect on the part of the M/V UNION RELIANCE or those in charge of her" (Vol. I—R.2 and 4). Substantially, the same terminology was used in Petitioner, China Union Lines, Ltd's. Petition

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7. The number three and number four engines were those engines used for backing power on the night of the collision.

8. It is to be remembered that the "service speed", not even the maximum speed, was originally approximately 17 knots.

for Exoneration or Limitation of Liability filed in the District Court on November 28, 1961 (Vol. I—R.73-4).

On February 19, 1963, in its Answer to Respondent, Lucy Duncan's, Request for Admissions, Petitioner, China Union Lines, Ltd., indicated that the only fault, if any, of Pilot Duncan was in bringing the UNION RELIANCE too close to her starboard bank in the bend at Beacon 75. It was reasoned that this gave the effect of increased hydraulic force between the vessel and the channel bank, thereby pushing the vessel away from the bank out of control. Such an effect is sometimes called "smelling the bank", "bank sheer" or "suction". (Request for Admissions at Vol. IV—R.1278—Answers at R.1288).

At the start of the principal portion of the trial[9] on March 11, 1963, Petitioner, China Union Lines, Ltd., made its opening statement:

> ". . . we have never been able to determine that there was anything wrong with the machinery on this ship (UNION RELIANCE) and we believe that the sheer was caused by the smelling of the bank; and I see no reason to amend our pleadings, but that's what we think are the true circumstances of the reason why our ship sheered across the channel." (Parenthetical expression added) (Vol. IV—R.1420).

Following trial, Petitioner, China Union Lines, Ltd. filed in the District Court, its "Findings of Fact and Conclusions

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9. In piecing together the complete "facts" it is sometimes necessary to refer to earlier proceedings; most especially the Transcript of Proceedings in the District Court commencing on December 3, 1962 (Vol. II—R.678 through Vol. III—R.1101), which contain testimony of surveyors J. R. Bencal and R. L. Wynne, concerning their employment by Petitioner, China Union Lines, Ltd., both prior to and after the date they were appointed Salvage Master and General Average Surveyor, respectively, by the District Court.

of Law Suggested by Petitioner, China Union Lines, Ltd." This document did not become a part of the Record. Summarized, Petitioner, China Union Lines, Ltd., contended in the District Court that the sole fault of the UNION RELIANCE was that of negligent navigation by Pilot Duncan. Therefore, it was urged that Respondent, Lucy Duncan, should be absolutely barred from recovery. Somewhat the same position was taken by Petitioner, China Union Lines, Ltd. before the Court of Appeals below.

The District Court found that there was ". . . *no* substantial evidence that this ("suction" or "bank sheer") in fact did cause this movement (UNION RELIANCE's crossing to the wrong side of the channel) . . ." (Parenthetical expression added). *See*, Footnote 1 to District Court's Finding of Fact No. 28.

The District Court's Interlocutory Decree of September 3, 1963, held Respondent, Lucy Duncan, to be entitled to recover her full damages from Petitioner, China Union Lines, Ltd., (Vol. XIV—R.5146-7).

Although the District Court heard forty-nine live witnesses, two witnesses by deposition, one by transcript of testimony at a prior Coast Guard Hearing and in addition, examined two hundred thirty-seven exhibits, Petitioner, China Union Lines, Ltd., maintained before the Court of Appeals that all of the District Court's forty-six Findings of Fact pertaining to fault or limitation were in error. It did not prevail.

In its Petition for Writ of Certiorari, China Union Lines, Ltd. has substantially altered its previous positions. For the first time, Petitioner, China Union Lines, Ltd., admits that there was negligence on the part of the officers and crew (not including Pilot Duncan) of the UNION RELIANCE

and that there were at least minor mechanical defects. *See*, Petitioner, China Union Lines, Ltd's. discussions of the Fire Statute (46 U.S.C.A. § 182) and the Limitation of Liability Act, (46 U.S.C.A. § 183, et seq). However, Petitioner, China Union Lines, Ltd. stoutly maintains that it is entitled to limitation of liability (apparently as a matter of law) because it had no personal knowledge of mechanical defects and because it had selected experienced and licensed officers and crew.

## REASONS WHY THE PETITION SHOULD NOT BE GRANTED

**When taken in context with the full Record, the decision in the Court of Appeals below presents no conflict with decisions of this Court or other Courts of Appeal on questions of privity and knowledge.**

Petitioner, China Union Lines, Ltd., bases its argument on two assumptions:

(a) Specific finding of crew's negligence precludes the Petitioner from being a party to that negligence.

(b) That having picked "experienced," "licensed" crew members, Petitioner cannot be held to have rendered its vessel unseaworthy by manning it with an incompetent crew.

At the very outset these assumptions completely ignore other findings by the Courts below, as follows:

(a) Petitioner, China Union Lines, Ltd., failed to inspect the steering system of their vessel; that such inspection would have revealed leakage of telemotor oil and use of devices to circumvent fuses; that Petitioner was, through its prior knowledge of many similar defects, on notice that

it should make such inspection (District Court's Finding of Fact No. 31).

(b) That the Captain and Chief Engineer were unaware of the proper use of the vessel's main engines and that the Petitioner, China Union Lines, Ltd., failed to take steps to see that they were familiar with proper operation of the vessel (District Court's Findings of Fact Nos. 32, 33 and 35 combined).

(c) That the telephone communication system on the vessel was inoperative and that in the exercise of due diligence, Petitioner, China Union Lines, Ltd., would have discovered and corrected this deficiency (District Court's Findings of Fact Nos. 34 and 35 combined).

Under our "Statement of the Case," we have referred to the Record at some length in connection with notice to Petitioner, China Union Lines, Ltd., of the many vessel defects and lack of knowledge of its officers as to how to properly run the vessel. Petitioner, China Union Lines, Ltd., had more than ample opportunity to carefully inspect its vessel, to make repairs, to fully instruct its crew in efficient operation of its vessel and to apprise them of prior difficulties. It did none of these things.

In our view, Petitioner, China Union Lines, Ltd., is now asking the Court to construe its prior holdings and those of the Courts below in such a manner that the *only* duty of a vessel owner is to place experienced (in time of service), licensed mariners on board its vessel, without regard to its knowledge not shared with its mariners, without regard to whether its mariners' prior experience is germane to the operation of the particular vessel and without regard to its knowledge or suspicions as to mechanical defects.

Petitioner, China Union Lines, Ltd., has cited three decisions by this Court in support of its views; *Craig v. Continental Insurance Co.*, 141 U.S. 638; 12 S.Ct. 97 (1891); *La Bourgogne*, 210 U.S. 95, 28 S.Ct. 664 (1908) and *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 91 (1943).

We respectfully submit, that even without consideration of other cases, the above do not support its contentions.

In the *Craig* case, supra, the only negligence alleged was that of one Reardon in attempting to tow a vessel. The owners had no knowledge of his appointment. He was held, at most to be "a mere employee." There is no indication that the vessel owners had any knowledge of his actions whatsoever.

In *La Bourgogne*, supra, the only negligence involved was that of the vessels' Master proceeding at an immoderate speed while in a dense fog. This Court clearly limited its holding in *La Bourgogne*, supra, in *The Linseed King*, 285 U.S. 502, 52 S.Ct. 450 (1932), to which further reference will be made.

In *Coryell v. Phipps*, supra, either crew neglect or a latent defect due to age, or both, were involved. Leaking gasoline ignited and caused the vessel to burn. The vessel owner clearly proved that he had had competent persons make frequent inspections for such conditions, but they had gone undetected. At page 412, this Court stated:

> "One who selects competent men to *store* and *inspect* a vessel *and who is not on notice as to any defect in it* cannot be denied the benefit of the limitation. . . ." (Emphasis supplied).

We respectfully submit that the rule in *Coryell v. Phipps*, supra, precludes limitation of liability by Petitioner, China

Union Lines, Ltd., under the facts of this case as found by the Courts below.

In the *Linseed King*, supra, this Court affirmed denial of limitation by the Courts below, stating at page 511:

> "It is said that the Master, admittedly competent had definite and positive instructions not to run through ice; that when he encountered ice on this trip from the New Jersey shore, it became his duty at once to abandon the trip and return to the Edgewater plant. The argument is that as the boat was seaworthy when there was no ice and instructions had been given to a competent Master not to run her through ice, the owner did its full duty and cannot be held responsible as having privity or knowledge of a violation by the Master of these explicit instructions. Cases such as *La Bourgogne*, 210 U.S. 95, 28 S.Ct. 664, 52 L.Ed. 973, which involved the Master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. It was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the Master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the Master to the owner's knowledge. The latter must rely upon the Master's obeying rules and using reasonable judgment. The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge."

Clearly, an owner may not hide his head in the sand and thereby prove himself to be "without privity and knowledge."

As stated in *Avera v. Florida Towing Corporation*, 322 F.2d 155 (5th Cir. 1963) at page 166:

> 'With the duty to make inquiry "the measure" of the knowledge "is not what the owner knows, but what he is charged with finding out". *Great Atlantic & Pacific Tea Co. v. Brasileiero*, 2 Cir., 1947, 159 F.2d 661, 665, 1947 AMC 306. For "* * * knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." *The Cleveco*, 6 Cir., 1946, 154 F.2d 605, 613, 1946 AMC 933."'

In *The Silver Palm*, 94 F.2d 776 (9th Cir., 1937, cert. den. 304 U.S. 616), the Court of Appeals held that the failure of the owner to advise its master of the unusual reversing characteristics of the vessel was sufficient to deny it limitation. The wording of a portion of the opinion had a familiar ring, at page 779:

> "The court below found that the Master of the SILVER PALM, Capt. Cox, did not know of the peculiarity of the Doxford engine at the time of the collision, though he had had command of the vessel for many months. Unless advised, it is entirely possible that a captain would not learn of this condition until he made the unusual emergency maneuver of reversing when going at a high speed ahead. With good luck, a vessel could well make several voyages around the world without requiring such action on his part."

The UNION RELIANCE also might have traveled further without the need of emergency full power astern

from all four engines. Petitioner, China Union Lines, Ltd., however, chose to take such a risk when it did not properly instruct its crew.

Many more cases in the Courts of Appeals could be cited. However, they appear to us to be unanimously in accord with the opinion of the Court of Appeals below.

The Court has always been reluctant to review concurrent findings of fact in the Courts below.[10] We respectfully submit that unless the Court undertakes to reassess the massive evidence against Petitioner, China Union Lines, Ltd., that it should deny the Petition for Writ of Certiorari presented by China Union Lines, Ltd., at least insofar as Respondent, Lucy Duncan, is concerned.[11]

Respectfully submitted,

JOHN V. WHEAT

J. DONALD STILLWELL

10. See: **The Carib Prince,** 170 U.S. 655, 18 S.Ct. 753, 42 L.Ed. 1181 (1898); **The Wildcroft,** 201 U.S. 378, 26 S.Ct. 467, 50 L.Ed. 794 (1905); **Luckenbach v. W. J. McCahan Sugar Refining Co.,** 248 U.S. 139, 39 S.Ct. 53, 63 L.Ed. 170 (1918); **Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,** 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920); **Just v. Chambers,** 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941); **Mahnich v. Southern S.S. Co.,** 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

11. We assume that it is possible to separate Respondent, Lucy Duncan, from matters presented by Petitioners, Mitsubishi International Corporation, et al and Lan Jing-Chau, et al. If such is not possible, then we wish to bring one further point to the attention of the Court. If Petition for Certiorari is denied to Petitioner, China Union Lines, Ltd., as to its liability and limitation, then Petitioners, Mitsubishi International Corporaton, et al, and Lan Jing-Chau, et al, will have a Final Decree in their favor against Petitioner, China Union Lines, Ltd., and questions of potential liability of other parties should become moot, since they are entitled to but one recovery.

# APPENDIX A

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November 29, 1963

J. Donald Stillwell, Esq.
1925 Bank of the Southwest Bldg.
Houston, Texas 77002

RE: In the matter of the Libel and Petition of China Union Lines, Ltd., owner of the S/S UNION RELIANCE, in a cause of exoneration from or limitation of liability—A.D. No. 2018 (Consolidated)—In the United States District Court for the Southern District of Texas Houston Division

. . . . . .

Claim of Lucy Duncan, Independent Executrix and widow and sole beneficiary of D. O. Duncan, deceased.

. . . . . .

Dear Sir:

This will confirm our agreement that all of the damages of your above client in the captioned matter are stipulated to be a total of $125,000.00 (One Hundred Twenty-Five Thousand and no/100ths Dollars), that you and your client will not be required to make your damage proof before the Court appointed commissioner herein and that you and your client agree that you will not move for a decree

on damages and will not move for or require security in this claim before final determination of the question of liability and issues appealed to appellate courts and return of mandate, and it is further agreed that this is without prejudice to any and all of Petitioner's contentions and defenses made herein or on appeal.

Please note your agreement to the above on a copy hereof and return same to the undersigned.

Yours very truly,

PLATOW & LYON
EIKEL, FLETNER & GOLLER
EASTHAM, WATSON, DALE & FORNEY

By CLARENCE S. EASTHAM
Proctors for Petitioner and Appellant

AGREED TO:

J. DONALD STILLWELL 12/2/63
J. Donald Stillwell
Attorney for Lucy Duncan, Independent Executrix, widow and sole beneficiary of D. O. Duncan, deceased

Office-Supreme Court, U.S.
FILED
JAN 31 1967
JOHN F. DAVIS, CLERK

NO. 933

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

CHINA UNION LINES, LTD.,
*Petitioners*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR MITSUBISHI INTERNATIONAL CORPORATION, ET AL., AS RESPONDENTS, IN OPPOSITION

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NO. 933

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

CHINA UNION LINES, LTD.,
*Petitioners*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR MITSUBISHI INTERNATIONAL CORPORATION, ET AL., AS RESPONDENTS, IN OPPOSITION

## STATEMENT OF THE CASE

Mitsubishi International Corporation, et al. (persons, firms, and corporations whose names are set forth at length in Exhibits A, B and C attached to the Interlocutory Decree Determining Liability filed on September 3, 1963, by

the District Court (See R. 5146-5164) and who are hereinafter sometimes referred to as "these respondents"), innocent owners of cargo on the Chinese Freighter UNION RELIANCE (hereinafter sometimes referred to as "the freighter"), have heretofore filed their petition (docketed under No. 927) praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled consolidated case on July 27, 1966, insofar, but only insofar, as said judgment affirms a dismissal by the District Court of these respondents' libel against the Norwegian Tanker BEREAN (hereinafter sometimes referred to as "the tanker") and her owner, A/S A. O. Andersen & Co., and holds that vessel and her owner free of fault and liability for the collision.

However, as set forth in the last paragraph of page 7 of these respondents' petition for certiorari, these respondents heartily approve and support the judgment of the District Court (and the Findings of Fact and Conclusions of Law supporting same (R. 5115 et seq.)) and the judgment of the United States Court of Appeals for the Fifth Circuit insofar as they hold China Union Lines, Ltd. (hereinafter sometimes referred to as "opposing petitioner") and the freighter liable to such cargo owners for their damages and deny to opposing petitioner the right to limit its liability and to recover general average from cargo interests. These respondents file this brief in opposition to the petition of China Union Lines, Ltd., for certiorari for the purpose of asserting the proposition that there is ample evidence in the record to support such portion of the District Court's findings and conclusions (and those of the Fifth Circuit) and that such findings and conclusions (and those of the Fifth Circuit) are not clearly

erroneous within the meaning of *McAllister* v. U. S. 348 U.S. 19 (1954), but rather are clearly correct and in no way call for the issuance of the writ of certiorari as to such matters.

The pertinent Findings of Fact of the District Court on these points commence at page 5119 of the Record with Finding 1 and continue through Finding 9 on page 5124. Further pertinent findings commence with 27 on page 5130 and continue through 35 on page 5135. The pertinent Conclusions of Law flowing from the above are numbered 1, 2, 3 and 5 (R. 5140), with all of which conclusions these respondents concur, with the exception of that part of Conclusion 3 wherein the District Court held the freighter and her owners "solely" responsible. As set forth in their petition for certiorari, these respondents feel strongly that the District Court (as well as the Fifth Circuit) should also have held the tanker and her owner, A/S A. O. Andersen & Co., at fault and liable.

These respondents' argument will be presented in the form of counter-arguments on reasons 3, 4 and 5 set forth in the petition of opposing petitioner as "Reasons for Granting the Writ." As such these respondents will be treating matters dealt with principally on pages 5-6, 22-27 and 46-54 of the petition of opposing petitioner.

## COUNTER-ARGUMENT UNDER OPPOSING PETITIONER'S REASON 3

Instead of finding, as asserted in the statement of Question 4 on page 5 and in the statement of Reason 3 on page 46 of opposing petitioner's petition, that the "primary and direct cause" of the collision was mere negligence of the ship's electrician or of other members of the crew of the freighter, the District Court actually found that fault and

negligence (with privity and knowledge) on the part of opposing petitioner caused the collision (please see Findings 28-35 appearing at R. 5130-5135 and at pp. 16-21 of Appendix D of opposing petitioner's petition). Such findings on the part of the District Court are, we respectfully submit, amply supported by the evidence. Some of such evidence is summarized below under the headings used by the Fifth Circuit (see that part of the Opinion of the Fifth Circuit appearing at p. 31 of Appendix A to opposing petitioner's petition) to list the specifications of opposing petitioner's negligence "with privity and knowledge" that "contributed to the unseaworthiness" of the freighter "and the collision."

## A. HER (THE FREIGHTER'S) STEERING GEAR WAS UNSEAWORTHY

Opposing petitioner concedes at pp. 55-56 that the freighter "was wrongfully on its port side of this narrow channel at the time of collision" and thus admits violations of: (a) Rule I, Art, 18, 33 U.S.C.A. § 203, Rule I and (b) Art. 25, 33 U.S.C.A. § 210. Such rules required the freighter to make a port to port passing with the oncoming tanker. However, the cause of the freighter's violations in this respect remains in vigorous dispute, it being contended by all parties except opposing petitioner that the violations were at least contributed to by a steering casualty occurring on the freighter, as testified to by her master (R. 1527 et seq.), her third officer (R. 1708-1710) and her assistant third mate (R. 1912), the only survivors from her bridge, and as found by the District Court. On the other hand, opposing petitioner claims that the freighter sheered across the channel from her right hand side to her left hand side by reason of navigating too close to her westerly bank in the turn at Beacons 75 and 76. As to the

latter, the testimony of the master of the freighter was to the effect that the freighter was to westward of the center of the channel (R. 1527, where he said the freighter was 150 feet from the right hand Beacon 75 in the 400 foot channel) but not far enough to westward to be affected by suction (R. 3710-3711). On the other hand, Pilot Lary of the tanker testified unequivocally that the freighter passed to the westward of the ranges in the vicinity of Beacon 75 and that he saw she was in trouble there and likely to sheer, and thereafter did sheer across to her left hand bank. (See R. 3587-3591 and R. 3614 et seq. and pages 4, 6-10, and 11-14 of these respondents' petition for writ of certiorari).

These respondents respectfully submit that a reasonable conclusion from all of the evidence on this point is that, since the captain of the freighter concedes that the freighter was to westward of mid-channel in the vicinity of Beacon 75, there was good reason for the tanker's pilot to observe and conclude as aforesaid. However, in view of all of the evidence from the freighter's surviving witnesses regarding the steering casualty, the subsequent stopping of the vessel and the dropping of both of her anchors, it certainly appears likely that the District Court and the Fifth Circuit were correct in finding that a cause contributing to the sheer of the freighter (and her failure to break same) was the steering casualty rather than suction from the bank alone, as contended for by opposing petitioner. In any event, on all of the evidence, the steering casualty was at least a substantial force contributing to the sheer and the ensuing collision.

The District Court stated in its Finding 29 (R. 5131 and opposing petitioner's petition at p. 17 of Appendix D thereof) that "By reason of the extensive damage to

the entire bridge, the wheel, and that portion of the telemotor system on the bridge caused by the fire, the cause of the steering failure cannot be determined with as high a degree of certainty as is desired." But then the Court went on to say and find that the casualty resulted from a blown fuse in the electrical circuit controlling the port replenishing pump of the steering gear. There was evidence in the record, as the District Court pointed out, to support such a finding, and there was some evidence that loss of hydraulic fluid in the steering engines (which the District Court found resulted from the blown fuse) would cause the steering wheel on the bridge to lock (R. 1609). On the other hand, it may be true (as the expert, Mr. Tarabochia, testified, R. 2987, 3141) that a steering casualty so caused would not cause the telemotor wheel on the bridge to be locked in position such that it could not be turned, as the freighter's bridge witnesses testified. However, even if for any reason the finding of the Court based upon the evidence of the blown fuse be found incorrect, then the result is the same insofar as opposing petitioner is concerned because that would leave the case as one involving an unexplained steering casualty. Under the authorities set forth below, and under the evidence, petitioner would still be liable for damage to the freighter's cargo, would not be entitled to the claimed defense under the Fire Statute (46 U.S.C.A. § 182) and would not be entitled to limit its liability under the Limitation Statute (46 U.S.C.A. § 183), exactly as the District Court concluded.

The freighter's bridge testimony was to the effect that the wheel on the telemotor on the bridge was locked and could not be moved (R. 1531, 1912, 3768, 3770) and that, whereas the gyro pilot wheel could be moved, the rudder would not respond (R. 3776). The only kinds of

failure of the steering gear that would be entirely consistent with these symptoms would be something that jammed the telemotor itself, either something in the gears or in the hydraulic line between the bridge and the steering engine room or in the steering receiving equipment in the steering engine room. In any event, it is clear that such a casualty could only result from unseaworthiness of the steering gear, and, if opposing petitioner sought not to be legally charged with the consequences of such unseaworthiness, the authorities placed on it a burden to show that the unseaworthiness or failure of the steering gear was not a result of fault or negligence on the part of opposing petitioner. This opposing petitioner failed to do.

Furthermore, in view of the fact that opposing petitioner sought limitation in this proceeding, it had the further duty, under the authorities cited below, to show that any fault in the above connection was without the privity and knowledge, or the failure to exercise due diligence, of opposing petitioner itself. This burden it also failure to carry.

Among the authorities for these propositions are the following:

(1) *Griffin on Collision*, § 241, Par. (5);
(2) *The City of Camden*, 292 Fed. 93 (3 Cir. 1923);
(3) *States Steamship Company v. United States*, 259 F.2d 458 (9 Cir. 1957, modified on petitions for rehearing, 1957, as amended on denial of rehearing on limitation, August 20, 1958), certiorari denied, 358 U.S. 933, petition for rehearing denied, 359 U.S. 921;
(4) *SS HEWITT*, 284 Fed. 911 (S.D.N.Y. 1922);
(5) *The CALVERT*, 51 F.2d 494, 498 (4 Cir. 1931);
(6) *The CLEVECO*, 154 F.2d 605 (6 Cir. 1946);

(7) *Petition of Midwest Towing Company*, 203 F.Supp. 727 (E.D.Ill. 1962);

(8) *The MIAMI*, 43 F.2d 562 (E.D.N.Y. 1930);

(9) *The NEW BERNE*, 80 F.2d 244 (4 Cir. 1935);

(10) *Dexter-Carpender Coal Co. v. New York, O. & W. Ry. Co., et al.*, 50 F.2d 270 (S.D.N.Y. 1931);

(11) *Austerberry, et al. v. United States*, 169 F.2d 583 (6 Cir. 1948);

(12) *Henson v. Fidelity & Columbia Trust Co.*, 68 F.2d 144 (6 Cir. 1933), rehearing denied, 69 F.2d 778; and

(13) *New York & Cuba Mail S.S. Co. v. Continental Insurance Co. of City of New York*, 117 F. 2d 404 (2 Cir. 1941).

As to an unexplained steering casualty, under the above authorities, the shipower is under a duty to show all possible causes of the casualty and that it was not negligent in connection with any such cause. Yet no effort was made by opposing petitioner to show the possible causes of the steering casualty, it being opposing petitioner's sole theory, apparently, that no steering casualty ocurred. Mr. Tarabochia, opposing petitioner's own steering gear expert, was employed by opposing petitioner after the collision to conduct steering tests in the presence of various surveyors representing other parties (R. 2983, 3125). Instead of advising Mr. Tarabochia of the facts and symptoms experienced at the time of the steering casualty and instructing him to determine the probable cause or causes of the steering casualty, based on such facts and symptoms, opposing petitioner did not even tell Mr. Tarabochia what these facts and symptoms were (R. 3017-3018, 3125-3126). Furthermore, he was not instructed to determine the cause of the casualty (R. 2983, 3125-3126). He was merely instructed to make a post-collision inspection of the steering gear and

to operate the gear in the presence of other surveyors. Such was the effect of his testimony.

Instead of establishing that the unseaworthiness of the steering gear was without the privity and knowledge of opposing petitioner, opposing petitioner's own witnesses furnished substantial evidence affirmatively showing such privity and knowledge. The Greek nationals selling the ship to opposing petitioner would not permit a thorough inspection of the vessel by representatives of the opposing petitioner prior to the closing of the sale (R. 2818-2819). Furthermore, opposing petitioner's representative (Mr. T. K. King), who went to Greece from West Germany to inspect the vessel for opposing petitioner, apparently was not an engineer (R. 2824, 2835). However, he wrote opposing petitioner that there were many conditions in the main engine room that were not up to standard (R. 2818-2819).

Opposing petitioner employed Bureau Veritas to survey the freighter prior to her purchase, but at the time of the survey the door to the steering engine room was locked (R. 2832). The first chief engineer on the freighter, upon arrival of the vessel in New Orleans, recommended to high officials of opposing petitioner that all auxiliary equipment for which the engineering department was responsible be completely broken down, inspected and overhauled (R. 2878, 2880). The reason for this recommendation was conditions found in the main engines and other equipment opened up in New Orleans (R. 2860). The company, solely in an effort to save money (R. 2860-2861), refused to permit such inspections, break-down and overhaul, and the evidence is to the effect that no reasonable inspection was ever made of the steering gear by opposing petitioner other than a cursory inspection by opposing petitioner's port en-

gineer in Taiwan. This particular inspection was of no significance because the port engineer stated that most of the time his back was to the steering engine gear, he being merely concerned with looking at the rams to see if the rudder was working properly (R. 2783-2784).

The evidence is to the effect that opposing petitioner knew (R. 2897-2899) that the vessel was consuming excessive amounts of telemotor oil, and this did or should have put opposing petitioner on notice that there was a leaky steering system and that the system was at least unseaworthy in that respect. That the freighter was probably not properly equipped with spare parts is shown by two things: (1) the fact that no spare part was located (Instead, the brush holder was repaired but not replaced before the casualty (R. 2639)) to replace the carbon brush holder in the starboard steering engine after the first steering casualty and before the second steering casualty that immediately preceded the collision; and (2) that there were no spare parts for the coils in the solenoids of the starter boxes, because wood blocks were used to close the circuits instead of replacing the coils. In all of these respects the steering gear was unseaworthy, with the knowledge and privity of opposing petitioner and as a result of the failure of opposing petitioner to exercise due diligence to make the vessel seaworthy. The District Court (affirmed by the Fifth Circuit) was clearly correct in its Finding 31 (R. 5133-5134 and pp. 19-20 of Appendix D of opposing petitioner's petition).

## B. HER (THE FREIGHTER'S) MAIN ENGINES WERE UNSEAWORTHY

Finding 7 (R. 5122-5123 and opposing petitioner's petition at pp. 8-9 of Appendix D) is an excellent summary of

the voluminous, virtually undisputed evidence regarding the condition of the main engines of the freighter and the knowledge of such conditions by officers of opposing petitioner. Another summary is contained in the report and testimony of Mr. A. T. Spindanger (opposing petitioner's engineering expert) (See Pet. Ex. 25-J, R. 2863-2868). Opposing petitioner's delay in replacing piston heads was caused simply by its desire to save money (R. 2860-2861). As found by the courts, the effect of this condition of the main engines was to decrease the power of such engines for maneuvering purposes, and particularly affected stopping power under emergency circumstances. It is clear that this was negligence on the part of opposing petitioner directly contributing to the collision in that such deteriorated condition of the main propulsion machinery resulted in the failure of the freighter to stop as quickly as she otherwise could and should have.

### C. HER (THE FREIGHTER'S) CAPTAIN AND CHIEF ENGINEER WERE NOT INSTRUCTED TO THE EFFECT THAT ALL FOUR OF HER MAIN ENGINES MIGHT BE COUPLED ASTERN

Contrary to opposing petitioner's statements contained in its petition to the effect that these officers had this knowledge, the weight of the evidence is to the contrary. While some of the answers to questions propounded to the master (R. 1618-1619 and 4794-4796) and to the chief engineer (R. 2212-2215) of the freighter were indirect, evasive and equivocal on this point, nevertheless, the clear import of all of their testimony was to the effect, and the District Court was thoroughly warranted in finding, that these officers did not know and had not been instructed by opposing petitioner that all four en-

gines could be coupled and running astern within less than a minute from any other position. Certainly there was no pre-arranged signal from bridge to engine room for this procedure, and it had never been done (R. 2341, 2349-2352). The master of the freighter testified that she traveled a half mile down the channel after her steering casualty (R. 1625). That she would have been able to stop sooner by using four engines astern rather than two engines is clear, and this was negligence of opposing petitioner contributing to the collision.

### D. HER (THE FREIGHTER'S) TELEPHONE COMMUNICATION SYSTEM BETWEEN THE BRIDGE, ENGINE ROOM, STEERING ENGINE ROOM, ETC., WAS UNSEAWORTHY

Undisputed evidence was to the effect that when the emergency arose, communications between the bridge and the engine room and between the bridge and the steering engine room, etc., were accomplished by sending messengers about the ship rather than by using the sound powered phones (R. 1688-1689, 1532, 3837-3838). Such evidence was sufficient in and of itself to show that such phones were unseaworthy. In the exercise of due care, this deficiency was known to opposing petitioner, or should have been known to it. That the deficiency contributed to the collision is clear because had there been a direct means of phone communication among bridge, engine room, steering engine room, and after steering station, the nature of the steering failure could have been communicated to the bridge; the trick wheel in the steering room, or the wheel at the after steering station, could have been utilized; and the engine room could have been advised specifically of the need for all possible speed astern.

The foregoing having shown that the collision was caused by negligence of opposing petitioner, with "privity and knowledge", it is also true that the fire incidental to the collision, which caused the destruction of these respondents' cargo was caused by the "design or neglect" of opposing petitioner, it being clear even from the authorities cited by opposing petitioner that the two concepts are equivalent. Please see for instance the case of *Craig v. Continental Insurance Co.*, 141 U.S. 638 (1891). The collision having been caused by the "design or neglect" of opposing petitioner, it is likewise clear that opposing petitioner is not entitled to relief from liability for loss of these respondents' cargo under the Fire Statute (46 U.S.C.A., § 182). Therefore, opposing petitioner's suggested question 4 and its reason 3 for granting the writ are not a proper basis for granting a writ of certiorari.

## COUNTER-ARGUMENT UNDER OPPOSING PETITIONER'S REASON 4

With all due respect, the argument of opposing petitioner appearing on pages 50-52 of its petition either answers itself or refers to the source of the answer in citing the case of *The City of Norwich*, 5 Fed. Cas., No. 2760 (D.C.N.Y. 1869). In that case, the only one known to these respondents on the point, Judge Benedict, a learned jurist in the Eastern District of New York, carefully considered the contention *in a collision case* that the Fire Statute (46 U.S.C.A. § 182) exonerated the shipowner when cargo was damaged by fire as a result of a collision. In holding that the Fire Statute afforded no defense to the shipowner under such facts, the court said:

> "But it is said that the goods in question were lost by the fire, and not by the collision, and that the fire

was accidental, and not the result of negligence. My opinion, however, is, that the fire must be considered to have been simply an incident of the collision, a natural result, almost sure to follow such a blow inflicted in certain places upon such a vessel as this steamer—a result which, in this instance, did follow the blow almost immediately and directly—and, as between the shippers and the ship, in law, a result of the negligence which brought the steamer in contact with the schooner.

"Indeed, the answer in the fourth article describes the fire as caused by the collision, and supposes it to be properly chargeable to the bad navigation of those on board the schooner.

* * *

"These views dispose of the argument, which was based upon the act of March 3, 1951. Assuming that this steamer was not excluded from the effect of the act by the seventh section—a question which has not been raised upon this argument—and assuming, also, that the act, although confined, in terms, to the owners, can be construed as applying also to the vessel—neither of which questions I here decide—it appears to be clear, that the first section of the act can have no application in a case where fire is but an incident of a collision. Losses by collision are provided for in a subsequent section, where, by the terms of the statute, the owners are made liable for such losses, to the extent of their interest in the vessel.

"My conclusion, accordingly, is, that these respective libellants are entitled to recover, of this steamer, the amount of the damages by them sustained by reason of the non-delivery of their goods. A decree will be, accordingly, entered, with orders of reference to ascertain and report the amount of such damages."

How it could make any real difference, as contended by opposing petitioner, that the fire in the case at bar spread to the freighter from fire on the tanker, rather than from fire originating in her own engine room as in the cited case, is difficult if not impossible to comprehend. These respondents firmly believe and contend that the distinction sought to be drawn is one without a difference and that the cited *City of Norwich* case, supra, properly settled the law contrary to opposing petitioner's contentions. No other case cited by opposing petitioner on the Fire Statute involved a collision.

From a factual standpoint, particularly in the Houston Ship Channel (one of the nation's leading arteries for the carriage of petroleum products), it is certainly as foreseeable as not that a meeting vessel will be carrying inflammables in her skin tanks and that burning liquids will be scattered throughout the area of any collision between vessels. Therefore, both from a legal and factual standpoint, the Fire Statute is no source of relief to opposing petitioner in its belated attempt to avoid liability for destruction of these respondents' cargo. As pointed out in the quoted language of Judge Benedict from the *City of Norwich* case, supra, Congress intended that shipowners' limitation of liability in collision cases should turn on 46 U.S.C.A. §183 (wherein liability for collision is expressly mentioned), rather than on the Fire Statute, 46 U.S.C.A. §182. Actually, the facts and authorities discussed by these respondents under the Counter-Argument Under Opposing Petitioner's Reason 3 above show clearly why no relief is available to opposing petitioner under either section in the case at bar, and certiorari should not be granted to review these questions.

## COUNTER-ARGUMENT UNDER OPPOSING PETITIONER'S REASON 5

As suggested hereinbefore, in incorrectly asserting that the only negligence of the freighter was that of her officers and crew, opposing petitioner virtually concedes that where as here there are findings and substantial supporting evidence of causative negligence with privity and knowledge on the part of opposing petitioner itself, there is no issue for certiorari on the limitation of liability point. By reason of the facts and authorities discussed in these respondents' Counter-Argument Under Opposing Petitioner's Reason 3 above, opposing petitioner is most certainly not entitled to limit its liability for the loss of these respondents' cargo. Therefore, these respondents will not burden this Honorable Court by repeating such facts and authorities here.

## CONCLUSION

While as set forth in these respondents' petition for certiorari heretofore filed in this case, these respondents contend and feel strongly that a writ of certiorari should issue from this Honorable Court to review the questions regarding the joint liability of the tanker and her owner in this consolidated case, nevertheless, further review is not merited on the questions of liability (or limitation of liability) of

the freighter, and therefore, as to those matters, should be denied.

Respectfully submitted,

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January, 1967

No. 934

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1966**

CHINA UNION LINES, LTD.,
*Petitioner,*

– versus –

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, *et al.*,
*Respondents,*

and

LAN JING-CHAU, *et al.*,
*Petitioners,*

– versus –

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, *et al.*,
*Respondents.*

## RESPONDENT AMERICAN CYANAMID COMPANY'S BRIEF IN OPPOSITION

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No. 933
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*Respondents.*

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## RESPONDENT AMERICAN CYANAMID COMPANY'S BRIEF IN OPPOSITION

### Statement of the Case

We are unable to accept Petitioners' statements of the case.

Acrylonitrile is a liquid petro chemical which has been manufactured in this Country since 1940. It is inflammable; its vapor, within certain limits of density, is explosive; and its fumes are toxic, as are those

of most petroleum derivatives. Inhalation of acrylonitrile vapors will cause headaches and nausea, but will not leave any aftereffects. From 1940 at least until this cargo was laden on the "Berean" at Good Hope, Louisiana, in November, 1961, there were no known deaths from the industrial use of acrylonitrile (Tr. 2049-50).

At the time of the collision acrylonitrile was classified by the United States Coast Guard as an inflammable liquid (46 CFR §146.21-100, p. 148), as are such common substances as anti-freeze preparations, cigar and cigarette lighter fluid, coal tar derivatives, lacquer, paint and varnish, crude oil, gasoline and road asphalt (46 CFR, revised as of January 1, 1966, §146.21-100, pp. 170-312). The United States Coast Guard has not classified acrylonitrile as an explosive, a Class A "extremely dangerous poison", a Class B "less dangerous poison", or a Class C "irritating substance" (46 CFR, revised as of January 1, 1966, §146.25, pp. 608-713).

Since the collision, the United States Coast Guard has revised its list of dangerous commodities on at least four occasions:

> Code of Federal Regulations, revised as of January 1, 1964 (46 CFR §146.21-100, p. 172 and §146.25-100, §146.25-200, pp. 594-693).
>
> Code of Federal Regulations, Supplement of July 1, 1964 (46 CFR §146.21-100, p. 20 and §146.25-200, pp. 220-257).
>
> Federal Register, December 22, 1964 (Vol. 29, No. 248, pp. 18163-18169).
>
> Code of Federal Regulations, revised as of January 1, 1966 (46 CFR §146.21-100, p. 172).

Acrylonitrile is still classified by the United States Coast Guard merely as an inflammable liquid. The Interstate Commerce Commission also classifies acrylonitrile merely as an inflammable liquid (49 CFR, revised as of January 1, 1966, §72.5, p. 7). As such there are no restrictions upon the type of tank or the location of the tank in which it may be carried on board a tank vessel. Only in the event that the United States Coast Guard classifies a cargo as an inflammable or combustible liquid having lethal characteristics, i.e. designated as a Class B or Class C poison, must the cargo be carried in tanks which are independent of the vessel's hull structure or separated from the skin of the ship by cofferdams, double bottoms or similar void spaces (46 CFR §39.01-1, §39.05-1). Section 39.05-10 provides that:

> "Cargo tanks independent of the hull shall be installed with a clearance of not less than 24 inches from the vessel's sides".

Although the above regulation does provide for additional precautions when carrying inflammable or combustible liquid having lethal characteristics, this regulation was not designed to protect the escape of such cargo following a collision. In the case herein the bow of the "Union Reliance" penetrated "substantially through the tank in which the chemical was stowed". (Opinion Ct. of Appeals, China Union Lines Appendix A, p. 42).

China Union Lines, Ltd. produced one witness, Heinrich Brieger, who attempted to give the impression during direct examination that had the United States Coast Guard conducted tests it should have classified acrylonitrile as a Class B poison. He

did state during direct examination "that is my opinion * * * but I have no proof of it" (Tr. 2057). This witness was unaware that the United States Government had classified acrylonitrile and categorized it merely as an inflammable liquid. When so advised during cross-examination (Tr. 2151-2152) Mr. Brieger finally stated "I cannot" testify that acrylonitrile should be classified as a Class B poison, "I hesitate very much to say" (Tr. 2156). Furthermore, Brieger never testified, as the Petitioners aver, that acrylonitrile was more "lethally dangerous" or more "deadly" than a five percent solution of hydro-cyanic acid (Tr. 2107-2113). The Court of Appeals for the Fifth Circuit categorized this witness' testimony as follows:

> "The printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. *In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error.*" (emphasis added) (China Union Lines, Appendix A, p. 41)

Contrary to the inference in the briefs submitted by Petitioners, no one testified that it was a common practice or custom to carry acrylonitrile in center tanks or in tanks separated from the skin of the ship by a cofferdam.

As a result of the collision the cargo of acrylonitrile which was laden in the #1 port wing tank of the

"Berean" caught fire and the fire spread to the foredeck of the "Union Reliance". The members of the crew of the "Berean" attempted to bring the fire on the "Berean" under control and were joined by a fire boat and some fifty United States Coast Guard Officers and enlisted personnel (Tr. 2300). The fire on the "Berean" was contained and extinguished in a matter of hours. Although these men fought the fire at the hatch from which the acrylonitrile was escaping, without face masks or breathing apparatus, none of the officers or crew members of the M/V "Berean" sustained any injuries (Tr. 5025); none of the Coast Guard Officers or enlisted men (Tr. 2301) nor any of the crew of the fire boat were injured (Opinion Court of Appeals, China Union Lines, Appendix A, p. 37). The master of the "Union Reliance" jumped overboard and was later rescued by those in the ship's life boat. He was burned but he did not suffer any ill effects from the acrylonitrile (Tr. 1557-1560). Eleven members of the fifty-one man crew of the "Union Reliance" perished. The District Court specifically found that the deaths did not result from any toxic effect of acrylonitrile but were caused as a result of the fire (Finding of Fact 27, China Union, Appendix D, p. 16). The Court of Appeals specifically affirmed this Finding, stating:

> "Any other finding by the judge, on the record before him, would be based on pure speculation and guess work." (China Union Lines, Appendix A, p. 39)

The Court of Appeals further said:

> "Aside from everything else, it would appear that the proximate cause of death of and injuries to

the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed." (China Union Lines, Appendix A, p. 42)

## The Position of Petitioners, Lan Jing-Chau, et al.

The Trial Court concluded that China Union Lines, Ltd. is responsible to the legal representatives or next of kin of the members of the crew of the "Union Reliance" who were killed as a result of the collision and subsequent fire, and was also liable to those members of the crew of the "Union Reliance" who received personal injuries, subject only to a reduction in the percentage of recovery by reason of their own negligent conduct. An Interlocutory Decree was entered so providing. The Court of Appeals for the Fifth Circuit affirmed. Accordingly, Petitioners Lan Jing-Chau, et al., are entitled to recover the full amount of their provable damages from the Petitioner China Union Lines, Ltd.

## The Questions Presented for Review

We take exception to the questions presented for review as formulated by Petitioners, at least insofar as they apply to American Cyanamid Company. The

Trial Court found as a matter of fact that the cargo of acrylonitrile was loaded on board the "Berean" in a careful and prudent manner (Finding of Fact 40, China Union Lines, Appendix D, p. 23). The Court of Appeals affirmed. Neither the Trial Court nor the Court of Appeals accepted Petitioners' contention that the Coast Guard improperly classified acrylonitrile. The questions for review as formulated by Petitioners presuppose facts which do not exist; factual contentions which were thoroughly considered and rejected by the Trial Court and the Court of Appeals.

We respectfully submit that under the criteria established by Rule 19 the case does not warrant review by this Honorable Court. The Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with a decision of another Court of Appeals on the same matter; it has not decided an important legal issue of Federal Law which has not been but should be settled by this Court; it has not decided a Federal question in a way in conflict with the applicable decisions of this Court, nor has it departed from the accepted and usual course of judicial proceedings. Petitioners are requesting this Court to review factual issues which have been decided adversely to their interests by the Trial Court and by the Court of Appeals for the Fifth Circuit.

## Conclusion

The Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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No. 933

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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CHINA UNION LINES, LTD., PETITIONER,

*v.*

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., RESPONDENTS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## PETITIONER'S REPLY BRIEF

---

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## PETITIONER'S REPLY BRIEF

---

### 1. To the Waiver filed by the Government

The waiver by the Government of its right to file a response is of course no agreement that the petition should be allowed nor that error has been committed below.

However, in Cause No. 838, October Term, 1966, upon the Court's docket, styled *Wyandotte Transportation Company, Union Barge Line Corporation and Cargill, Inc., et al, Petitioners v. United States of America, Respondent,* the

Government's response acknowledges that issues the same as those decided herein, namely allowing the Government to recover *in personam* from a negligent shipowner the costs of wreck-removal, are important questions which merit review by this Court.

In the Memorandum for the United States in that Cause No. 838, pp. 4 and 5, it is acknowledged that the decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other Courts of Appeal, but it is denied that the decisions in this instant cause are in conflict with the decision in Cause No. 838 and in *United States v. Wilson*, 235 F.2d 254 (C.A. 2) and states,

> "In the *China Union* case, the government sought (and was granted) relief solely *in rem* against the vessel; it did not seek recovery *in personam*. The statement '. . . the Government could not proceed *in personam* against China Union . . .' (id. at 792) is dictum."

Such reference to the contentions of the Government in the instant China Union case is in error: The Government's libel (R. 39-43) is entitled "United States of America, Libellant v. The Wreck of the UNION RELIANCE and Her Cargo, in rem, and against China Union Lines, Ltd. in personam, Respondents", alleges specific acts of negligence of the vessel and her owners and operators, and prays for citation to issue against China Union and for a decree "against the property and against the respondent for any deficiency for its costs and expenses". The trial Court of course in its earlier decision in reality allowed partial recovery *in personam* of certain expenses in the peculiar manner described in the Petition herein, pp. 40-46, and in its final decision granted recovery *in personam* of the balance of the Government's expenses,

App. D, p. 27, to the Petition, of course affirmed on appeal.

(As this goes to the printer, we have learned that the petition for writ of certiorari has been granted in Cause No. 838. It is respectfully suggested since the issues are the same the petition should therefore here be allowed also.)

## 2. To the Opposition Brief of A. O. Andersen & Co., Owners of the BEREAN

Petitioner here respectfully points out that no serious attempt is made to justify the gross violations of the statutory rules to avoid collision, as found by both Courts below (complete absence of lookout), admitted by the pilot of the BEREAN, and fully established as proximately causative by the indisputable physical facts.

The opposition brief in generalities simply attempts to describe as proper findings of fact concurred in by the two lower courts what are in reality conclusions of law (or at best mixed findings of fact and conclusions of law) impermissible under the physical facts and the undisputed testimony of the BEREAN's own navigators, and hence not those specific findings of fact based upon substantial evidence, and conclusions of law, which are of course accorded by this Court finality where concurred in by the two lower Courts.

## 3. To the Opposition Brief Filed on Behalf of Lucy Duncan

This opposition brief is stated to be solely a rebuttal of Petitioner's contention that limitation of liability should not be denied on the ground that the owners had not instructed fully licensed officers how to operate engines when

the evidence clearly established that they had actual knowledge of the way the engines could be operated.

To support these contentions it is thus stated of the Chief Engineer Mr. Dah (properly Hsu Dah).

> "He *never* knew that all four engines could be run astern (R. 2210-15)." (Page 9 of Duncan brief.)

The testimony of Chief Engineer Hsu Dah is directly to the contrary, and there is no other evidence of record: His testimony on this subject is as follows:

R. 2168:

> . . .
>
> "Q. Now, after you became chief engineer in August of 1961, did you examine the engines of that vessel?
>
> "A. I examined the engine of UNION RELIANCE on her way from Kaohsiung to Keelung, with the former engineer of that ship.
>
> "Q. And did you understand how to operate those engines of the UNION RELIANCE, as a result of this examination?
>
> "A. I know. Certainly I know."

R. 2213-2214:

> . . .
>
> "Q. And you didn't know whether it was possible to use four engines astern, did you?
>
> "A. It could be done. However, we never did it that way.
>
> "Q. Chief, isn't it a fact that at the time of the Coast Guard hearing, you didn't know whether it was possible to use all four engines astern?
>
> "A. I knew it was possible to do it, but we never did it in this manner. We had enough power, under

ordinary conditions, to use two engines ahead and two engines astern.

. . .

"Q. Do you understand what a signal means, when the telegraph is rung up and down several times, and is then left on the full astern position?

"A. No. We had no necessity to run four engines astern. Why should we run four engines astern, while we had enough power with two engines? If four engines had to be run astern in emergency, we would have to turn them over and stop, slow; there would not be enough time to do all this."

. . .

At R. 2239, the chief engineer demonstrates clearly he knew that all four engines could be used for astern power; he describes how to couple all four to the shaft to turn it astern.

Secondly, the same statement is made about Captain Hsu Wen Tai,

". . . however, he *never* knew that four engines could be used astern. (Vol. V - R. 1652-4; Vol. X-R. 3814-8.)" (Page 9 of brief.)

What the captain actually testified to was that while the four engines could be used for ahead or astern such was not the practice. At R. 3815-3816 his testimony is as follows:

"Q. Did you know that all four engines on your ship could be made to go astern and move the ship in an astern direction with all four engines being coupled to the shaft?

. . .

> "A. Basically, all four engines could be used for ahead or astern. However, we simply have never tried this . . ."

(Like testimony appears elsewhere in the Record.)

It is respectfully submitted that it is *not* the law that an owner must instruct a fully licensed, experienced captain in all phases of ship operation, particularly where as here it is indisputable under the evidence that one minute of astern propeller turnings out of three between a full astern order and a collision would be completely lost by fully stopping the engines in order to couple all four engines to the shaft whereas no appreciable time or astern power was lost by using only two engines astern.

Nor is it an accurate summary of the testimony of the witness Muh to state, as it is on p. 10 of the Duncan brief, that

> "No examination of the steering engines or electrical equipment was made in spite of his prior knowledge that the consumption of telemotor oil was excessive (Vol. VII - R. 2783-4)."

His testimony was that Lloyd's surveys of the vessel's engines were made, on which he attended, at Keelung and at Kaohsiung, at which times the main engines were opened up, R. 2773, 2782, and the steering engines examined by an operating test. R. 2783. His testimony on the point, after stating there had been no report or record of any trouble with the steering engines, is as follows, R. 2783-2784:

> . . .
>
> "A. Normally, during special survey or annual survey of a ship—even under special survey, the ship

will undergo an operating test. The wheel on the bridge will be turned to the port or starboard, in an operation test. This is all required, even in a special survey, that is, the operation test as such, and generally there is no overhauling of the steering engine or steering gear required.

. . .

"A. As much as I recall, I went to the stern of the ship to look at the rudder. I did not go down to look at the rudder—down to the steering engine room. Oh, no, no; let me think. I did. I did go down to the steering engine room, to see the movement of the rudder, and it was operating normally."

Finally, the brief is in error in stating that there has been substantial alteration of previous positions of Petitioner, if it be of any moment: It has always been the position of Petitioner that the *sole fault* of the UNION RELIANCE in the entire matter was in being navigated so close to her starboard bank that the vessel was caused to sheer across channel, as the quotation from counsel's opening statement on page 12 of the Duncan brief plainly shows; that such fault properly speaking was not causative since the BEREAN was grossly at fault and struck the UNION RELIANCE after she was securely anchored by both anchors.

### 4. To the Opposition Brief of Mitsubishi International Corporation, et al, as Respondents

With respect to the opposition made to Petitioner's Reason 4 for Granting the Writ, the Mitsubishi brief is in accord with the petition that there is only one District Court case which speaks on this matter of whether the Fire Statute exonerates an owner from liability to cargo

following a collision of ships. That case, *The City of Norwich,* was of course one where the fire *did* originate on the cargo-carrying vessel, not at all the same as the case here where the fire originated on the non-carrying vessel. Petitioner respectfully submits this matter is of such importance that it should be decided by this Court.

Certainly under Reason 5 for Granting the Writ the Petition cannot be read as acknowledging in the least that there is any evidence to support the conclusion of the lower courts here that limitation of liability should be denied on account of any negligence of the fully licensed officers, or acknowledgment of any privity to or knowledge of any unseaworthiness by petitioner.

Turning to the other contentions of the Mitsubishi opposition brief, on p. 13 of the brief it is stated that damage to cargo caused by a collision occurring with "privity and knowledge" and destruction of cargo by fire caused by the "design and neglect" are "equivalent concepts". *Craig v. Continental Insurance Co.,* 141 U.S. 638 (1891).

This is plainly an erroneous view of the holding in that case and of the law: The limitation of liability (against *all* claimants, including owners of cargo on petitioner's vessel) accorded by the provisions of Section 183(a) of Title 46, U.S. Code, is *separate and distinct* from the exoneration from liability to cargo on the vessel granted by the Fire Statute, Section 182 of Title 46. The holding of this Court to this effect is plainly put in the quotation on page 49 of the Petition, from the Court's decision in *Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha,* 320 U.S. 249, 64 S.Ct. 15 (1943), which need not here be repeated.

Replying to the Mitsubishi brief opposing grant of the writ for Reason 3, in (A), page 4 of that brief, there is no evidentiary support for the attempt to reconcile the contention of the UNION RELIANCE captain that his vessel's steering gear or equipment failed and this caused his vessel to travel across channel—he specifically testified without any corroborating evidence that his vessel did *not* get close to her starboard bank—and the BEREAN pilot's detailed testimony that the UNION RELIANCE did sheer away from the bank when it moved "past the ranges" on making the bend. The Mitsubishi suggestion that each fault contributed to the across-channel movement is simply speculation.

Nor do any authorities, including those cited by Mitsubishi, hold that where a shipowner denies any mechanical failure, and contends as does Petitioner here that the vessel's sheer was caused by navigational error, that it must take the absurd position of trying to imagine possible other causes and refute fault in connection with each.

As Mitsubishi plainly implies, there was no expert or logical support for the UNION RELIANCE'S captain affirmations that the steering wheel on the bridge locked and this showed the vessel's steering engines failed. (The captain was of course on the bridge for the bare three or four minutes between the commencement of the sheer and the collision. He jumped overboard and certainly could not have observed the steering engines. The assistant electrician, who was at all times in the steering engine room, and the chief engineer and chief electrician who ran to it just before the collision, said the steering engines and rudder operated properly until the impact.) The chief engineer applied the words "absolutely impossible" to the theory that lack of oil in the steering system could lock the wheel

on the bridge. R. 2269. (His testimony that locking of the wheel could be caused only by jamming of the gears on the bridge, R. 22, is apparently concurred in by Mitsubishi, at page 7 of the brief.)

Further, due diligence or none is immaterial where there is as here no substantial evidence of any failure of machinery. The reference on page 10 of the brief to lack of spare parts is directly contrary to the testimony of the First Assistant Engineer, R. 4861-2, and of course if using wooden blocks to support a weak solenoid coil caused an overload and a fuse to blow and thus stopped an electrical motor, how can it be argued that using wooden blocks could close circuits and thus run the motor? Such is the dilemma in which Mitsubishi (and the Court below it should with respect be noted) finds itself in arguing for the wooden block-blown fuse theory.

*Mitsubishi's point (B), p. 10 of its brief, the unseaworthiness of the main engines of the UNION RELIANCE.*

Much is made of the reduced power which of course results from aging of engines. But as the witness Muh testified, the main engines were opened and examined before the vessel sailed from Taiwan and passed by Lloyd's surveyor as seaworthy and likewise so considered by Mr. Muh, himself a qualified marine engineer. R. 2781-2782.

And here again Mitsubishi's argument is self-defeating: If the vessel's reduced power reduced her astern maneuvering speed it of course to a like extent reduced her ahead speed, and it cannot be reasonably urged that the reduced power was causative.

What rule grants limitation only to ships with new engines?

*Mitsubishi's point (C), p. 11 of its brief, on the owner's failure to instruct the officers.*

In the reply made above to the Lucy Duncan brief this matter of the knowledge of the Chief Engineer and the Captain of the UNION RELIANCE about use of the vessel's engines is considered.

*Mitsubishi's point (D), p. 12 of its brief, re the ship's telephones.*

As the petition points out, there is *no* evidence that the UNION RELIANCE telephone system was unseaworthy, and the testimony of the vessel's crew that the telephone system was in all respects operative is full and complete. It is amazing indeed that it can even be argued, to any persons who use telephones and thus are acquainted with the delays nearly always encountered in answering telephones and the difficulties often met with in understanding telephone conversations, that for short distances such as on shipboard using messengers proves telephones are inoperative. This glaring *non-sequitur* is completely illogical: A messenger covering a short distance is far faster than getting someone to a telephone and explaining a matter to him.

## 5. To the Opposition Brief of American Cyanamid Company

Upon page 3 of this opposition brief it is acknowledged, as it must be, that the Coast Guard regulations require inflammable cargoes with lethal characteristics to be carried in cargo tanks "separated from the skin of the ship by cofferdams, double bottoms or similar void spaces".

The actual language of the regulation is ". . . or in tanks built integral with the vessel's hull and completely sep-

arated from the shell of the vessel by means of wing tanks, cofferdams, double bottoms or similar voids" (46 C.F.R. § 39.05-1)—language far stronger than the brief suggests. And it is of course undisputed that the BEREAN had only wing tanks and *not* cofferdam spaces around the center tanks, and hence to comply with the regulation could have only carried the acrylonitrile in a center tank. Had it done so, none of the lethal cargo could have escaped from the collision.

The brief then goes on to say ". . . this regulation was not designed to protect the escape of such cargo following a collision". What is then the purpose of the regulation, to prevent contamination of the cargo? And how would American Cyanamid explain the statutory language, 46 U.S.C. § 170(7), which directs the Coast Guard Commandant to make regulations for dangerous substances "In order to secure . . . against the hazards of health, life, limb, or property created by . . . dangerous . . . substances", or the language of the regulation, 46 C.F.R. § 146.01-1, "The purpose of the regulations . . . is to promote safety . . . in the transportation of explosives or other dangerous . . . substances"?

How can it be denied that acrylonitrile is a "poisonous liquid . . . known to be so toxic to man as to afford a hazard to health in transportation" when the captain of the BEREAN himself died within a few months after this collision from inhalation of "fumes" while attempting to stop a small leak in the vessel's pumproom? R. 3301, Petitioner's Exh. 31-A, B, C. How can it be denied that since the American Cyanamid's own pamphlet describes the liquid in exact terms, compares it to well-known poisons, and expressly describes how carefully it must be

transported, it did not know that acrylonitrile was "so toxic to man as to afford a hazard to health during transportation", and hence a Class B poison under the exact language of the regulation 46 C.F.R. § 146.25-10?

On page 4 of the American Cyanamid brief it is stated ". . . no one testified that it was a common practice or custom to carry acrylonitrile in center tanks or in tanks separated from the skin of the ship by cofferdam". The witness McWaters testified that he had seen several barges loaded with acrylonitrile and in tanks on one ship after the cargo had been discharged although he had not actually participated in loading that particular product. R. 3315. After testifying about the lethally dangerous properties of acrylonitrile, he testified chemicals as dangerous as and even less dangerous are carried in the centerline cargo tanks on the vessels, tanks especially prepared for carriage of petrochemicals. R. 3318, 3323. He also testified he had been aboard vessels which had carried and were carrying acrylonitrile. R. 3336 and 3337. While he thus did not actually in so many words testify he had seen *acrylonitrile* carried only in centerline tanks of vessels, it is submitted his testimony can be reasonably construed to mean only that.

And how can it be seriously stated by American Cyanamid now, in this case, that "Inhalation of acrylonitrile vapors will cause headaches and nausea but will not leave any after-effects" (page 2 of its opposing brief) when it has been proved the very captain of the BEREAN lost his life from such inhalation!

But here the important question of law remains: Can a manufacturer of what it knows is a lethally toxic and dangerous product rely on a classification which permits

less care in transporting the product than its known properties require under the broad statutory regulations? Can it be held to have exercised due care when it does not use the precautions in transportation commonly employed in its own industry for the transportation of the same or less deadly chemicals?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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LAN JING-CHAU, ET AL., PETITIONERS

*v.*

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., RESPONDENTS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## PETITIONERS' REPLY BRIEF

It is of course no answer to the petition herein to suggest as do A. O. Andersen & Co. and American Cyanamid Co. that they should escape liability for their own plain faults in the carriage of this lethal chemical acrylonitrile because the lower Courts have allowed recovery against the owners of the UNION RELIANCE. Such suggestions lead one to conclude that no valid, substantial points in opposition to the petition can be advanced.

Certainly none such have been put forward by A. O. Andersen & Co.

Nor in reality have any substantial points in opposition been made by American Cyanimid Co.: It attempts, in the face of the evidence of the death of the captain of the BEREAN from acrylonitrile poisoning caused by inhalation of fumes, and the plain statements of the extreme toxicity to man of the chemical set forth in its own descriptive pamphlet, to contend (on pages 1 and 2 of its brief) that while inflammable and explosive within certain limits that it is really no more toxic than most petroleum derivatives (*no mention being made* of its extreme toxicity from skin absorption or ingestion—very important matters indeed under the facts of this case) as far as its "fumes" go.

And then it argues, with such admissions of toxicity in its brief, and the much greater undisputed detailed evidence of the chemical's lethal properties in the record and its toxicity to man so established as fully known, it is completely insulated from fault by a specific Coast Guard classification, when the broad regulation, 46 C.F.R. § 146.25-10, in clear language makes the chemical a Class B poison and thus requires carriage quite different from that here employed. The carriage employed indisputably resulted in the deaths of those on whose behalf this petition is filed.

It is really rather extreme to state (on page 3 of the brief) that carriage in inner tanks, or spaces protected by cofferdam voids, is not designed to avoid as far as possible and still permit water transportation escape of the chemicals in a ship collision, when the statute, 46 U.S.C. § 170(7), and the Coast Guard Regulation, 46 C.F.R. § 146.01-1, plainly state the purpose of regulation of water transportation of dangerous substances is to protect health, life, limb, and property.

And it then argues that the industrial standards of care which the uncontradicted evidence established are usually employed in the transportation of dangerous, poisonous chemicals do not apply to this particular chemical acrylonitrile!

Petitioners respectfully urge that such contentions are plainly unsound, for the detailed reasons set forth in their petition.

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NO. 933

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD., *Petitioner*

-versus-

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

**On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 933

IN THE

# Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD., *Petitioner*

-versus-

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

**On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:*

Petitioner China Union Lines, Ltd., respectfully moves this Honorable Court for a rehearing of its order entered herein on February 20, 1967, denying the petition for writ

of certiorari, and again prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition filed herein January 4, 1967, and would respectfully show that for this there exist intervening circumstances of substantial or controlling effect and other substantial grounds available although not previously presented, as follows:

## GROUNDS FOR ALLOWING REHEARING AND FOR GRANT OF WRIT OF CERTIORARI

### 1.

### In Personam Recovery by the Government of Wreck-Removal Expenses

This Honorable Court has now granted its writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit in Cause No. 838, October Term, 1966, styled *Wyandotte Transportation Company, Union Barge Line Corporation and Cargill, Inc., et al., Petitioners v. United States of America, Respondent,* in which the Court of Appeals allowed an *in personam* recovery against the shipowner and others for the costs of removal from a navigable channel of a wreck.

The Government in that case has by its brief acknowledged the public importance of the question presented, and that the decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other Courts of Appeals even though it claimed the decision is correct.

In this instant case, while both the trial Court and the affirming decision of the Court of Appeals in giving the grounds of decision *purportedly* followed the holdings of

other Courts of Appeals that the Wreck-Removal Act (33 U.S.C. § 415) accorded the Government no *in personam* rights against a vessel owner but allowed it only rights *in rem* against the vessel and cargo for removal expenses, the *actual holdings* of the Courts below gave the Government recovery *in personam* from petitioner.

In the *statement* of the governing law the decision of the Court of Appeals is therefore in direct conflict with its own decision in the *Wyandotte Transportation Company* case; in its *holdings*, the decision is in conflict with decisions of other Courts of Appeals, *Loud v. United States*, 286 Fed. 56, 59 (6 Cir. 1923), *The Manhattan*, 85 F.2d 427 (3 Cir. 1936), *United States v. Bethlehem Steel Corporation (The Texmar)*, 319 F.2d 512 (9 Cir. 1963).

The writ having been granted in the *Wyandotte Transportation Company* case, petitioner respectfully submits the writ should be here granted also.

**2.**

**Dismissal (on Demurrer) of Libels Against American Cyanamid Company**

The trial Court freed American Cyanamid Company, the manufacturer-shipper of the chemical cargo the Court found toxic and dangerous as well as inflammable, on the ground that the law imposed on it no greater duty toward third persons than to warn the carrier of the dangerous properties of the toxic chemical, which was done.

The Court of Appeals' only reference to this duty of the manufacturer-shipper of the chemicals which the trial Court had clearly found were toxic and dangerous was to say that it

> " . . . assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual",

But it then held American Cyanamid free from liability for the same reasons it affirmed that the carrier had been rightfully exonerated from any liability.

The trial Court upon ample evidence found that the chemical which escaped and here caused the deaths, personal injuries and nearly all of the large property losses was lethally toxic and dangerous to health and that such properties were well known to the manufacturer-shipper and the carrier. Nevertheless both it and the Court of Appeals failed to follow the statute (46 U.S.C. §391a) governing *bulk* shipments on tank vessels as here and the Coast Guard regulations made pursuant to *that statute*, 46 C.F.R. §§39.01-1 and 39.05-1(a) and 146.25-10, which expressly forbade *transportation in bulk* in the wing tanks of *tank vessels* of inflammable liquids known to be toxic. Instead the Court of Appeals erroneously followed the trial Court in applying here the Interstate Commerce Commission classification for inflammables shipped in *containers* on *cargo* vessels (not *bulk* chemicals shipped in tank vessels) adopted pursuant to the provisions of 46 U.S.C. § 170 by the Coast Guard, printed at 46 C.F.R. § 146.21-100.

Since the statutes and regulations made pursuant thereto in clear language impose on all concerned with their handling the duty toward *everyone* to comply with the regulations for safe transportation of dangerous substances, dissenting Circuit Judge Brown was clearly right in stating neither Court applied the proper standard of care to the duty of American Cyanamid Company.

The decision below is thus squarely contrary to statute.

It is also in direct conflict with the decision of all the judges *en banc* where dangerous products are concerned of the Court of Appeals in *Simpson Timber Co. v. Parks*, 369 F.2d 324, at 328-329, and 331 et seq. (9 Cir. 1966). (The record in that case has now been lodged with the Clerk of this Court, having been forwarded on February 17, 1967, petitioner is informed, and in which petitioner is assured a writ of certiorari will be sought to review the decision of the majority, which freed the product manufacturer from liability where the product was an ordinary object not inherently dangerous as was the chemical here.)

Petitioner respectfully submits that the fact findings of the trial Court have been disregarded, and that the decision below in completely exonerating from liability a manufacturer-shipper of a lethally toxic, inflammable liquid who knowingly permits its bulk transportation in the wing tanks of a tank vessel, which was in direct contravention of the applicable Coast Guard regulations lawfully promulgated pursuant to statute, is clearly erroneous. It is as well with respect to the duty of a manufacturer-shipper of a dangerous product contrary to decisions by other Courts of Appeal. Writ of certiorari should therefore be granted.

## STATUTES AND REGULATIONS INVOLVED

### On First Point

#### Wreck-Removal Act

**33 U.S.C. § 415—Summary removal of water craft obstructing navigation.**

"Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sink-

ing or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided,* That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further,* That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo: and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. Mar. 3, 1899, c. 425, § 20, 30 Stat. 1154."

## On Second Point

### Statutes Here Pertinent To Dangerous Cargoes

**46 U.S.C. § 170—Regulation of carriage of explosives or other dangerous articles on vessels—Vessel defined.**

"(1) The word 'vessel' as used in this section . . . shall not include any . . . vessel subject to the provisions of section 391a of this title, which is con-

structed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in its own tanks . . ."

* * *

"Transportation, etc., of other explosives or other dangerous articles; exceptions

"(6) (a) It shall be unlawful knowingly to transport . . . except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: . . .

"(b) This subsection shall not apply to—

* * *

"(vi) inflammable or combustible liquid cargo in bulk: Provided, however, That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title."

"Regulations for protection against hazards created by explosives or other dangerous articles.

"(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)- (5) or (6) of this section apply—

"(a) The Commandant of the Coast Guard shall . . . classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section with respect to the descriptive names . . . and certification of such explosives or other dangerous articles . . . and *shall accept and adopt for the purposes above mentioned in this subsection such . . . classifications,* specifications of containers, packing, marking, labeling and certification of explosives or other dangerous articles or substances *to the extent as are or may be established from time to time by the Interstate*

*Commerce Commission* insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water.

**46 U.S.C. § 391(a)—Vessels having on board inflammable or combustible liquid cargo in bulk.**

"(1) Vessels included

"All vessels . . . that shall have on board any inflammable or combustible liquid cargo in bulk . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: . . .

"(2) Rules and regulations for handling liquid cargo

"In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary . . . with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; . . ."

COAST GUARD REGULATIONS THUS PERTINENT

**46 C.F.R. § 39.01-1—Scope of regulations—TB/ALL*.**

"(a) The regulations in this part contain requirements for the transportation of inflammable or combustible liquids having lethal characteristics and defined as Class 'B' or 'C' poisons in §§ 146.25-10 . . . of this chapter. . . ."

(*TB/ALL by definition, 46 C.F.R. § 30.01-5(c) means tank ships and barges plying all waters.)

**46 C.F.R. § 39.05-1—Design, construction, and arrangement—TB/ALL.**

"(a) Cargo having a Reid vapor pressure not exceeding 14 pounds per square inch *may be transported*

. . . in tanks built integral with the vessel's hull and *completely separated from the shell of the vessel by means of wing tanks,* cofferdams, double bottoms or similar voids."

**46 C.F.R. § 146.01-1—Purpose of regulations.**

"The purpose of the regulations in this subchapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States . . ."

**46 C.F.R. § 146.02-5—Compliance.**

"The applicable provisions of the regulations in this part shall be observed by:

(a) All vessels, domestic or foreign, subject to the regulations in this part, and the owners, charterers, agents, masters or persons in charge of such vessels;

* * *

"(c) All shippers, their agents or other persons offering explosives or other dangerous articles or substances and combustible liquids for transportation on board vessels;"

**46 C.F.R. § 146.25-10—Less dangerous poisons, Class B, liquids and solids, poison label.**

"(a) Poisonous liquids or solids (including pastes and semi-solids), other than Class A, C, or D poisons, which *are known to be so toxic to man as to afford a hazard to health during transportation,* or which, in the absence of adequate data on human toxicity, are presumed to be toxic to man because they fall within any one of the following categories when tested on laboratory animals: . . .

## CONCISE AMPLIFICATION OF GROUNDS FOR ALLOWING REHEARING AND GRANT OF THE WRIT

### FIRST POINT

**In Personam**
**Recovery by the Government**
**of Wreck-Removal Expenses**

### STATEMENT

The collision left the hulk of petitioner's vessel the UNION RELIANCE aflame, with the bodies of its ten dead aboard. Anchored, it blocked the Houston Ship Channel. The survivors of its crew had been taken off by the Coast Guard and taken ashore.

The United States Engineers cut the anchor chains and towed the vessel out of navigable channels to waters in Galveston Bay. The cost of this operation was $8,582. Immediately after the vessel had there been re-anchored, the Government requested petitioner to remove its dead and salve the vessel, which still had aboard it valuable cargo. Petitioner immediately resumed possession of its vessel and commenced salvage operations. R. 773-775.

Over petitioner's protest, R. 1002, the Government kept a tug standing by as a precaution against the vessel dragging her anchor and again blocking a navigable channel. The cost was $21,188. After petitioner had removed the dead and extinguished the fires, the Government libeled the vessel *in rem* and petitioner *in personam*, R. 39, for all these expenses. (After the seizure by the marshal ship-keepers were kept aboard the vessel by the Government, while it was in the custody of the Court trustee and of the Court-

appointed salvors after transfer of title to the trustee by petitioner seeking limitation. These expenses amounted to $6,031.38.)

Following a hearing held to consider payment of salvage expenses out of the proceeds of the sale of the vessel, the trial Court decided that the Wreck-Removal Act (33 U.S.C. § 415) permitted the Government only an *in rem* recovery of actually necessary harbor-clearing expenses. However, it did not grant recovery of these from the funds derived from the sale of the vessel but instead in reality allowed the Government an *in personam* recovery from petitioner: The Court required petitioner on pain of dismissal of its limitation petition to pay these actual expenses ($8,582) into the registry, which it allowed the Government then to withdraw. R. 1152-1155, printed Appendix A, page 23 below.

It held that the stand-by tug costs were *not* proper wreck-removal expenses, stating

> "The other items of expense composing the claim of the United States were incurred after the vessel reached anchorage in Bolivar Roads. These were not a necessary part of clearing the Channel, and the extraordinary rights afforded by § 415 do not attach thereto. . . ."

Determination of whether these were salvage expenses was deferred. In its final decision, it allowed the Government recovery of these *in personam* from petitioner, holding

> "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter

of the claim of the United States." (R. 5141, reprinted Appendix A, page 24 below.)

(Contrarily, the interlocutory decree provided that these other sums, the stand-by tug and the ship-keeper expenses, sought by the Government, totalling $27,219.38, were proper salvage charges, and reimbursement as such was decreed from funds in the Court's registry. R. 5148-5149)

The Court of Appeals affirmed, holding that while it was correct that wreck-removal expenses were recoverable only *in rem*, it was lawful to require a limitation petitioner to remove the Government's statutory lien from its vessel by requiring it to pay these before it would allow surrender. It held further that the stand-by tug expenses (directly contrary to the trial Court's ruling that they were *not*) were properly wreck-removal expenses and that the ship-keeper's costs were an "expense of justice" and recoverable. (Reprinted, Appendix A, commencing page 25 below.)

## ARGUMENT

While, as stated in the First Point, the Courts below have *stated* that the Wreck-Removal Act grants only an *in rem* recovery of its expenses to the Government, in *effect* (as well as explicitly by the trial Court in paragraph 9 in its Conclusions of Law, set forth above) they have held petitioner liable *in personam* for not only the actual wreck-removal expenses but also for all the balance of the Government's voluntarily incurred incidental expenses: The stand-by tug expenses which the trial Court expressly found were *not* necessary to removal of the wreck, and the expense of ship-keepers voluntarily put aboard the hulk to preserve a *statutory* lien (not possessory) while it was in the Court's possession.

Clearly, for a Court to require a petitioner in limitation to remove liens as a condition of permitting it to seek limitation of its liability is contrary to the limitation statute, and of course also to the decisions and Rules of this Court. The jurisdiction of the Court attaches immediately on the filing of the petition, and cannot be taken away by any subsequent irregularity. *Re Morrison,* 147 U.S. 14, 13 S.Ct. 246 (1893). The statute requires *only* the surrender of petitioner's interest in his vessel, 46 U.S.C. § 183, its value immediately after a casualty. *City of Norwich (Place v. Norwich & New York Transp. Co.),* 118 S.Ct. 468, 6 S.Ct. 1150 (1886). And the Admiralty Rules require only the *listing,* not removal, of claims of lien. Admiralty Rule 51, now Civil Supplemental Rule F.

While a paragraph of the interlocutory decree of the trial Court denominates the stand-by tug expenses and the ship-keepers expenses as "salvage expenses", its *decision* grants an *in personam* recovery of these from petitioner. Clearly, neither expense can possibly be lawfully classed as salvage expenses, as they saved nothing, were only watchmen, and the actual salvage was being successfully prosecuted by competent salvors. The Court of Appeals tacitly acknowledges this in holding contrary to the trial Court that stand-by tug expense is a wreck-removal cost even though the ship was no longer in a navigable channel and the ship-keepers expense an "expense of justice".

The Court of Appeals has therefore *effectively* held that the Government can lawfully recover from a shipowner *in personam* not only its actual wreck-removal expenses but also other expenses incurred after the wrecked vessel was no longer obstructing in any way a navigable channel. The decision is therefore in substance (though not in language, in which it is of course in conflict with) in accord

with its decision in the *Wyandotte Transportation Company* case, No. 838, October Term, 1966, on this Court's docket, and petitioner respectfully submits that the writ having been granted in that case it should in equity be also here granted.

## SECOND POINT

### Dismissal (on Demurrer) of Libels Against American Cyanamid Company

### STATEMENT

After petitioner and the other libellants against American Cyanamid Company had rested their case in chief, American Cyanamid Company demurred and on demurrer the trial Court dismissed the libels. R. 3454-3455, reprinted Appendix B, page 30 below. In so doing it stated that the law imposed on the manufacturer and shipper (here of course American Cyanamid Company) of an "inherently dangerous commodity" "the duty to warn and advise others . . . of its dangerous propensities." It went on to find "the evidence shows clearly that that was done, and that the carrier was fully advised of the dangerous characteristics of the cargo". And the libels were accordingly dismissed.

In the trial Court's decision, after finding that the BEREAN loaded tons of acrylonitrile in the three No. 1 tanks, of which of course one was the No. 1 port tank, it found

> "11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a pro-

> longed period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. . . ."

The Court then referred to the chemical's Coast Guard classification in 46 C.F.R. § 146.21-100 as an inflammable liquid and not as a poison. (R. 5124, reprinted Appendix B, page 31 below.)

By its next two Fact Findings the trial Court found that while the collision was not severe the No. 1 port tank of the BEREAN was breached, "causing its acrylonitrile cargo to become ignited and explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited", and as a consequence eleven persons were killed, others injured, and the UNION RELIANCE lost, along with much of her cargo. (R. 5130, reprinted Appendix B, page 31 below.)

The trial Court then found that the place of carrying the cargo violated no Coast Guard regulations nor was it negligence. R. 5136-5137, reprinted Appendix B, page 32 below. No reference was made to the statute (46 U.S.C. §391a) which requires all concerned with placing dangerous substances *in tank vessels* in water-borne commerce to comply with applicable Coast Guard regulations, nor those regulations, 46 C.F.R. §§ 39.01-1 and 39.05-1, which require carriage of such dangerous cargoes in tanks "completely separated from the shell of the vessel by means of wing tanks".

The Court of Appeals affirmed the decision of the trial Court as one lawfully based upon substantial evidence. It made only a passing reference to the duty of a manufacturer-shipper of dangerous products, saying that liability

was "assumed had there been a breach of duty, tortious or contractual".

Dissenting Circuit Judge Brown, however, held that certainly a prima facie case of liability had been made out against American Cyanamid Company and stated that neither Court had "faced up" to the law governing the manufacturer-shipper of dangerous commodities well known by it to be dangerous.

The ultimate decision in *Simpson Timber Co. v. Parks, supra,* will have a direct bearing on the law in this case; as it now stands, the two decisions are of course in direct conflict.

## ARGUMENT

Petitioner respectfully submits that the trial Court here, upon a great deal of ample evidence, has found that the chemical cargo in addition to being inflammable and explosive was "highly toxic, and gives off poisonous and dangerous fumes" which can cause illness and death. It is so specifically found in paragraph 11 of the Fact Findings, R. 5124, Appendix B, page 31, and likewise found when the libels against the manufacturer-shipper were dismissed. It further found that both American Cyanamid Company and the carrier had knowledge of these dangerous properties. R. 3454-3455, Appendix B, page 30, as above stated.

Such findings therefore bring the chemical and all concerned with its handling in tank vessels in water-borne commerce within the purview of the statute regulating such vessels carrying *inflammables in bulk,* 46 U.S.C. § 391a, and duties imposed upon such persons by Coast Guard regulations made under the authority of that statute (46 U.S.C. § 391(a)(2)), namely those set forth in 46 C.F.R. § 39.01-1, 46 C.F.R. § 39.05-1, and 46 C.F.R. § 146.25-10:

The first such regulation, 46 C.F.R. § 39.01-1, states that the regulations contain requirements for transportation of "inflammable or combustible liquids having lethal characteristics" and defined as Class "B" or "C" poisons in § 146.25-10 . . . of this chapter. The second such regulation, 46 C.F.R. § 39.05-1, prohibited carriage of such a liquid in a wing tank, as it was here carried. And the third such regulation, 46 C.F.R. § 146.25-10, defined the inflammable liquid having lethal characteristics the carriage of which in tank vessels was being so regulated as

> "Poisonous liquids . . . which *are known to be so toxic to man as to afford a hazard to health during transportation* . . ."

The trial Court having so expressly found on ample evidence that the chemical here was lethally toxic, and thus afforded a hazard to health in transportation, the statutory and regulatory purposes of the regulations to protect the public by compelling transportation as directed by the regulations were here clearly breached, and American Cyanamid was erroneously relieved from liability.

The Courts below are in obvious error in relying so heavily on the classification of the chemical by the Coast Guard only as an inflammable liquid in 46 C.F.R. § 146.21-100. Under the provisions of the statute *governing article shipments on vessels other than tank vessels*, 46 U.S.C. § 170(7)(a), the Commandant of the Coast Guard is *required* for such *article* shipments to accept the Interstate Commerce Classification, the statute providing

> ". . . the Commandant of the Coast Guard . . . shall accept and adopt for the purposes . . . of this subsection such . . . classification . . . of explosives or other dangerous substances . . . as are or may be

established from time to time by the Interstate Commerce Commission . . ."

The Commandant so interprets his obligation under this statute: Proceedings of the Merchant Marine Council, United States Coast Guard, Vol. 24, No. 2, February, 1967, page 32, which sets forth in inviting attendance at a hearing on proposed changes in regulations, including Dangerous Cargo Regulations,

> ". . . R.S. 4472, as amended (46 U.S.C. 170), requires that the Coast Guard accept and adopt such . . . classifications . . . of containers, packing . . . and certification of explosives or other dangerous substances . . . as are or may be established . . . by the Interstate Commerce Commission. . ."

This was a shipment *in bulk*, aboard a *tank vessel* and not an article carried aboard a *cargo* vessel, for which the classification at 46 C.F.R. § 146.21-100 shows that classification is intended. The statute, 46 U.S.C. § 170(6)(a)(vi), plainly states handling *in bulk* "shall be subject to the provisions of section 391a of this title", under the authority of which as shown the Coast Guard forbids shipment of liquid poisonous inflammables known to be toxic to man in wing tanks.

The chemicals here were found by the trial Court lethally toxic, inflammable, and explosive on ample evidence. Under the provisions of 46 U.S.C. § 391a and the authorized Coast Guard regulations 46 C.F.R. §§ 146.01-1 and 146.02-5 it was the statutory duty of American Cyanamid Company (as well as of the BEREAN) to comply with the requirement that this cargo be carried in tanks protected by wing tanks. The trial Court has expressly found that the collision breached only the wing tank, and it has thus found that

the great deaths and losses here directly resulted from breach of the applicable statutory regulations.

The Court of Appeals was therefore in clear error in holding otherwise, and dissenting Circuit Judge Brown clearly correct in stating both Courts failed to apply the lawful standard of care in this case.

## PRAYER

Petitioner prays that its motion for rehearing of its petition for issuance of writ of certiorari be granted, and that thereafter the writ issue, restricted if the Court should so determine proper to the issues herein set forth but if permissible under the rules on all grounds heretofore set forth in the petition.

Respectfully submitted,

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CLARENCE S. EASTHAM
*Of Counsel*

## CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered February 20, 1967, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

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# APPENDIX A

## FIRST POINT

### Portions of Decisions Below Re Government's Wreck-Removal Expenses

#### 1. Of the Trial Court

a. Memorandum Opinion, January 28, 1963.

* * *

"*Claim of the United States Government*—

"The United States makes claim for $35,801.38. This consists of a number of items, some for preparing and towing the disabled vessel to an anchorage in Bolivar Roads November 10, 1961; for services of a standby tug while so anchored November 10-27, 1961; for hire of a 'ship keeper', around the clock, November 27, 1961 to January 12, 1962; and for overhead charges of the Corps of Engineers.

"As noted earlier, following the collision the Union Reliance was a burning wreck swinging on her anchor in the Houston Ship Channel. This navigable waterway was effectively blocked, with a number of vessels trapped up stream in the Port of Houston. Under § 409 of Title 33, U.S.C.A., the duty was imposed upon Petitioner immediately to remove the wreck and to clear the Channel. Petitioner was unable or unwilling to do so, and her representative (Mr. Eikel) so advised the Engineers. Proceeding under § 415 of Title 33, U.S.C.A. on November 10, while still unable to board the vessel the Engineers had her anchor cut and the vessel towed to safe anchorage in Bolivar Roards. The sum of $8,582.00 was expended for this operation. I find that this sum was properly spent for this purpose by the Engineers, was reasonable in amount, and was necessary to clear the Channel.

"Proceeding under § 415 of Title 33, U.S.C.A., the United States filed its libel in this Court November 17,

1961, seeking sale of the vessel and her cargo, and seeking personal recovery against Petitioner for certain other expenses alleged to constitute legitimate salvage items. When the limitation proceeding was filed herein November 28, 1961, this libel by the United States, together with others against Petitioner, was enjoined. On more careful consideration I have concluded that this Court was in error in restraining the sale of the vessel and her cargo, in the event reimbursement was not made within the thirty day period provided by § 415.

"Under this Section, and the authorities interpreting it, it seems clear that these costs of clearing the navigable waterway do not give the United States an in personam claim against the shipowner. Loud v. United States, 286 F. 56 (6th Cir.); Hagan v. Richmond, 52 S.E. 385; Petition of Highlands Nav. Corporation, 29 F. (2d) 37 (2nd Cir.); 56 Am. Jur. 687, WATERS, § 227. They create no 'liability of the owner of any vessel . . . for any embezzlement, loss or destruction . . .' of any goods shipped on such vessel, or for any 'loss, damage, or injury by collision,' or otherwise, which may be limited under the terms of § 183 of Title 46, U.S.C.A. There is no liability of the owner at all. Rather, these costs are an in rem charge against the vessel and her cargo, to recover which the United States may sell both vessel and cargo. The United States was undertaking to follow this statutory procedure. She had maintained possession of the vessel, through the presence of the ship keeper and Deputy U.S. Marshal, until this Court intervened and took custody through its trustee under the limitation proceeding.

"Had this Court not intervened, on the Government's claim remaining unpaid by December 10, 1961, (being thirty days after the expense was incurred) the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit.

Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A.

"The other items of expense composing the claim of the United States were incurred after the vessel reached anchorage in Bolivar Roads. These were not a necessary part of clearing the Channel, and the extraordinary rights afforded by § 415 do not attach thereto. While—as the United States contends—the Union Reliance thereafter constituted a potential hazard to navigation—it does not follow that all of the expenses incurred by the Engineers in performance of their duty to protect commerce may be taxed here. I withhold passing upon whether this remaining portion of the Government's claim constituted salvage expense until trial on the merits.

"Proctor for the trustee is requested to prepare order for the payment of the claims mentioned above from the limitation fund; and providing for payment into the Registry by Petitioner of the amount of $8,582.00, within thirty days from this date, as a condition of maintaining the limitation proceeding." (R. 1152-1155)

b. Decision, July 17, 1963.

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* * *

Findings of Fact

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"44. The services rendered to the UNION RELIANCE while she was at anchor in Bolivar Roads, and

subsequent thereto, by the United States were, in the light of circumstances then existing, reasonable and necessary; and the charges made therefor reasonable in amount and consistent with charges generally made for similar services in that vicinity." (R. 5137-5138)

* * *

Conclusions of Law

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"9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States." (R. 5141)

c. Interlocutory Decree Determining Liability.

"ORDERED, ADJUDGED and DECREED in Admiralty No. 2012 that the United States of America, libelant, is entitled to recover its salvage charges, as a valid claim in rem against the M/V UNION RELIANCE, and the proceeds of the sale thereof now in the registry of the Court, and the amount of the government's reasonable salvage charges having been already determined; it is therefore, ORDERED and DIRECTED that after payment of all unpaid Trustee's expenses, United States of America is entitled to recover out of the amount now in the registry of the Court the sum of Twenty-Seven Thousand Two Hundred Nineteen and 38/100 Dollars ($27,219.38), with interest thereon at the rate of six per cent (6%) from the date hereof until paid, (the United States of America having already recovered out of the funds in the registry of the Court the sum of Eight Thousand Five Hundred Eighty-Two Dollars ($8,582))." (R. 5148-5149)

## 2. Of the Court of Appeals

* * *

### CLAIM OF UNITED STATES

China Union alone challenges the claim of the United States. The claim consists of three separate items:

(1) expense of removing and re-anchoring the RELIANCE, $8,582.00, and

(2) expense of shipkeepers and similar expenses to preserve the property, $6,031.38, and

(3) expense of stand-by tug to prevent the vessel from moving and re-blocking the channel, $21,188.00.

That the RELIANCE, as a result of the casualty, became a flaming derelict which imperiled the very existence of other watercraft and obstructed and prevented the navigation of the channel, is beyond argument. The owner and underwriters were unable to control the fire. Acting under the emergency provisions of 33 U.S.C. § 415, the United States District Engineer, after a special investigation, made a determination that the RELIANCE was a special danger to navigation and, after notice to owner, directed that the vessel be towed from the channel and anchored in Bolivar Roads, adjacent to the channel.

After removal of the vessel, the United States filed a libel, asking for the sale of the vessel,[25] to pay the cost of removal and incidental expenses. This proceeding was enjoined, on November 29, 1961, on China Union's petition for a limitation of liability. After granting the injunction, the judge required China Union to pay into court the cost of removal of the vessel in the sum of $8,582.00. Other proceedings, and allowances, are outlined in detail in *American Cyanamid Co. v. China Union Lines* 306 F.2d

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[25] Sold as scrap for $109,100.00.

135 (5th Cir. 1962), in which proceeding the circuit court refused jurisdiction, but suggested that the district judge might make findings on the issues presented.

On the first issue, the Government must prevail. It had a statutory right to hold the vessel and cargo, dispose thereof at public sale and deduct from the proceeds $8,582.00, the expenses of removal. While the Government could not proceed *in personam*, against China Union, *United States v. Bethlehem Steel Corp.*, 319 F.2d 512 (9th Cir. 1963), *cert. denied* 375 U.S. 966 (1964) and *United States v. Zubik*, 295 F.2d 53 (3rd Cir. 1961), we must remember that it was China Union which was seeking the injunction and a limitation of its liability. It was to its advantage, and the advantage of its underwriters, to free the RELIANCE of the Government's statutory lien, and secure the decree of injunction. The judge, in requiring China Union to make this payment, recognized that the equities were with the Government and that the Government's lien was first in time and prior in right.[26] The order of the court did not amount to a judgment *in personam* against the petitioner, but merely required China Union to do what it should have done in the first instance.

On December 3, 1962, after receipt of the mandate of the Court of Appeals, the judge held a supplemental

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[26] "Had this Court not intervened . . . the Government might have sold the vessel and her cargo. The statute does not make this right conditional. It exists irrespective of the Petitioner's right to limit. Petitioner may not deprive the United States of its right of sale by undertaking to surrender the vessel. The payment of this sum—and release of this charge against the vessel—was necessary before she could be surrendered in a limitation proceeding. Hence, under § 185 of Title 46, U.S.C.A., I fix this sum of $8,582.00 as an additional amount to be deposited with this Court by Petitioner, for the use and benefit of the United States, as necessary to carry out the provisions of § 183 of Title 46, U.S.C.A." (Order, January 28, 1963.)

hearing, at which time testimony was taken and exhibits introduced in connection with the nature and reasonableness of the Government's and other claims. Eighteen witnesses testified at this hearing and there is solid evidence to support the finding in favor of the Government. The fact that the judge's finding on the subject, is included under his conclusions of law,[27] is of no significance. *Compania Transcontinental de Petroleo, S.A. v. Mexican Gulf Oil Co., et al,* 292 Fed. 846 (2d Cir. 1923); *Arkansas Amusement Corp. v. Kempner,* 57 F.2d 466 (8th Cir. 1932). Even in the absence of a finding of fact, this being a trial *de novo,* we would be compelled to say that the record fully supports the pertinent provisions of the interlocutory decree. True enough, specific amounts are not mentioned in this finding. However, there can be no misunderstanding as to the amounts, in that the division of the Government's claim, both in the exhibits and the testimony, was uniform and precise. They are the figures which are set forth, with exactness, in the interlocutory decree.

It is our view that item (3) of the Government's claim is also covered by the provisions of 33 U.S.C. § 415, and that the lien against the RELIANCE for such item was also first in time and prior in right. The statute contemplates that the Government hold said vessel for a period of thirty days, after notice to the owner, and thereafter until sale. It is logical to assume that the Congress intended the Government to take proper care of the vessel during possession. The "expense of removing," in our opinion, should not be limited to the precise cost of removing the vessel from the place of the casualty to a place of safety, but should also cover any and all reasonable expense incidental

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[27] "9. China Union Lines, Ltd. is liable to the United States of America for the expenses incurred in connection with this incident and made the subject matter of the claim of the United States."

to the removal and enforcement process, such as the expense of safe-guarding. This expense is contemplated by the statute. Petitioner's arguments that the tug hire of $21,188.00 was not a legitimate expense, is illusory in the extreme. The record discloses many considerations which weighed in favor of having the tug stand by, rather than using two anchors. The District Engineer, after consultation with Coast Guard officers, decided to use only one anchor and have the tug stand by, so as to be assured of its immediate availability in case the anchor did not hold. Those making the decision were of the opinion that (1) two anchors might foul the vessel, (2) the anchor windlass and the deck supporting it had been subjected to severe fire, (3) the "upper shots" of the anchor chain had been subjected to severe heat, (4) the Galveston area was subject to severe changes in weather conditions, (5) the tide was exceptionally swift where the vessel was anchored, and (6) the vessel, even with dual anchors, might well slip back into the channel. True enough, the court eventually found that the tug was not necessary to keep the RELIANCE at its anchorage, and this is the point on which China Union principally relies. Here, the mischievous aura of validity which lurks behind the veil of hindsight is again presented. The original action of the District Engineer in ordering the tug to stand by, when viewed in light of his obligation to protect the traffic in the channel without unduly jeopardizing the vessel and its cargo, is quite understandable. The judge's action, in subsequently ordering the tug dismissed, was taken after more than two weeks of actual experience in holding the vessel at anchor. It does not imply disapproval of its previous use; indeed, doubtless because of his own wise reluctance to be governed by hindsight, the judge expressly refused to pass on that question at that time. The record reveals no subsequent

developments weighing against his ultimate approval of the charge.

On November 27, 1961, the judge dismissed the tug from standing by the RELIANCE and, on that day, placed shipkeepers aboard pending the further order of the court. At the same time, custody of the vessel was taken by the United States Marshal and the court was thereafter in possession. Earlier, on November 24th, the District Engineer, acting on order from the United States Attorney's office, caused shipkeepers to be placed aboard and the cost of employing those shipkeepers, round the clock, both before and after the court order is, in major part, the basis for the Government's claim of $6,031.38. China Union charges that the Government was no longer in possession of the vessel and is not entitled to this allowance. This claim is without validity, whether we view the service performed as under the statute, or as an allowance by the court to the Government for expense incurred in connection with protecting the vessel, after the seizure by the Marshal. Our only area of doubt is whether any allowance should be made for the three day period November 24-27, when the tug was also standing by. It does not appear that this "over-lapping" was called to the attention of the judge and he may want to take another look at this feature in the other proceedings which must be hereafter conducted by him. We believe that the employment of the shipkeepers on and after November 27th, should be treated as an "expense of justice" and entitled to perferential treatment. *New York Dock Co. v. S.S. POZNAN*, 274 U.S. 117 (1927); *THE ST. PAUL*, 271 Fed. 265 (2d Cir. 1921). Since these expenses were necessary they should be allowed. *Yokahama Bank v. Wong*, 113 F.2d 329 (9th Cir. 1940); *THE TRANSFER NO. 7*, 176 F.2d 950 (2d Cir. 1949).

# APPENDIX B

## SECOND POINT

### Portions of Decisions of the Courts Below Re the BEREAN'S Acrylonitrile Cargo

#### 1. Of the Trial Court

a. Trial ruling dismissing Libels against American Cyanamid Company.

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* * *

"As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way the BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R. 3454-3455)

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* * *

b. Decision, July 17, 1963.

*Findings of Fact*

* * *

"10. On November 6, 1961, the BEREAN loaded 14 tons of acrylonitrile at Good Hope, Louisiana. Upon the direction of the officers of the vessel, this shipment was placed in the forwardmost cargo tanks of the BEREAN, being No. 1 port, No. 1 center, and No. 1 starboard.

"11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. Acrylonitrile is and was at the time of the casualty classified under pertinent Coast Guard regulations as a Grade C flammable liquid (46 C.F.R. 146.21-100), as is gasoline, benzine, naphtha, etc. It is not classified as an 'extremely dangerous poison', nor as a 'less dangerous poison' (46 C.F.R. 146.25-5; 146.25-10)." (R. 5124)

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"26. . . . The impact was not severe, and injured no one. It was hardly felt in some portions of the two vessels. However, the bow of UNION RELIANCE breached the No. 1 port tank of BEREAN, causing its acrylonitrile cargo to become ignited and to explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited. The vessel continued to burn for several days, as noted above, and she became a constructive total loss.

"27. As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang, Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Yen, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130)

* * *

"40. BEREAN was not at fault in carrying acrylonitrile cargo in her forward tanks. She violated no Coast Guard regulation by doing so, and I find this was not a negligent or careless manner of loading."[5]

* * *

*Conclusions of Law*

* * *

"4. The only fault of the BEREAN having been one which did not and, under the circumstances, could not have contributed to the collision, A/S Andersen & Co., and the BEREAN *in rem* are not liable to any of the libelants who have made claims against them, and are exonerated and freed of liability in these actions." (R. 5140)

c. Interlocutory Decree Determining Liability

"* * *

"ORDERED, ADJUDGED and DECREED, in Admiralty No. 2006, libelant, China Union Lines, Ltd., recover nothing against respondent, A/S A. O. Andersen & Co. and the M/V BEREAN, and the libel is dismissed with costs, and that A/S A. O. Andersen & Co., as cross-libelant therein, recover of and from the M/V UNION RELIANCE and cross-respondent, China Union Lines, Ltd., the damages sustained by it in consequence of the matters referred to in the cross-libel, and costs: It is, further,

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[5] "While petitioner offered evidence tending to show that a greater safety factor would result if there were inner lining of the tank so that an air space was maintained between the skin of the ship and the outer wall of the wing tanks, these experts conceded that it was the custom and practice to carry gasoline and other inflammable and explosive liquids in tanks immediately adjacent to the skin of the ship." (R. 5136-5137)

"ORDERED, ADJUDGED and DECREED that in Admiralty No. 2007, libelant, American Cyanamid Company, shall recover of and from the M/V UNION RELIANCE and her owner, China Union Lines, Ltd., the damages sustained by libelant in consequence of the matters referred to in said libel, together with costs; and the cross-libel filed in Admiralty No. 2007, by China Union Lines, Ltd. against American Cyanamid Company is dismissed with costs, and any intervening libels or cross-libels against American Cyanamid Company in any of the actions consolidated in Admiralty No. 2018 are hereby dismissed with costs;" (R. 5149-5150)

2. OF THE COURT OF APPEALS

a. Opinion of the Court

* * *

CLAIM AGAINST CYANAMID

China Union and the Consul General complain of the action of the judge in dismissing the libel against Cyanamid. Aside from the subject discussed under Assignment V, the appellants pose two additional assignments against Cyanamid: (1) the procedure on the dismissal, and (2) that Cyanamid had actual knowledge, or by the exercise of reasonable diligence should have known, of the dangerous, poisonous and lethal characteristics of acrylonitrile, of which the Coast Guard and BEREAN had no knowledge.

At the outset, we must stress the grave doubts we entertain on whether China Union has standing to press these assignments. The damage to RELIANCE and its cargo was caused by fire, not by the poisonous or toxic qualities of the chemical. Since gasoline and other such products are as flammable and explosive as acrylonitrile and since such other products may be legally carried in forward tanks,

next to the skin of the ship, it would seem that no causal relationship exists between the toxicity of that chemical and the fire damage to China Union's property, or its cargo.

(1) The first point is one of procedure, rather than substance. The record shows that during the course of the trial, the judge asked all parties if all evidence, except as to damages, had been presented against Cyanamid. After counsel for the respective parties indicated that they had no additional evidence to offer against that company, its proctor moved for a dismissal.[19] Forty pages of the record are devoted to a transcription of the arguments of the proctors on this motion. No claim was made that there was additional evidence to offer on the subject. For that matter, the precise issues raised on this appeal were fully argued to the judge. At the conclusion of the arguments, the motion was taken under advisement and was not decided until the following morning, at which time the judge found in favor of Cyanamid.[20] Obviously, the judge made findings on the issues then before him. In the formal findings,

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19 "Mr. Waesche: If Your Honor please, in that event we would like to move to dismiss the action against American Cyanamid, on the grounds that the libelants have failed to establish a cause of action against them." (R. 3413.)

20 "As to the motion of American Cyanamid Company for judgment at the conclusion of the petitioner's case, I think the motion is well taken and will be granted. As the manufacturer and shipper of an inherently dangerous commodity, I understand the law to impose on them the duty to warn and advise others who may come in contact with it of its dangerous propensities. I think the evidence shows clearly here that that was done, that the carrier was fully advised of the dangerous characteristics of the cargo, and without deciding the question, but if there be any fault in the way BEREAN was loaded, as to which tanks the cargo was carried, and so forth, I consider that to be a fault of the vessel and of Andersen, and not of the shipper." (R.3454.)

the judge made it clear that he was passing on the issue of the liability.[21] We must view this record as the findings of the judge on the issues then presented. Those findings, unless clearly erroneous, even though informal, are binding on us. *Myles v. Quinn Menhadden Fisheries*, 302 F.2d 146 (5th Cir. 1962). The fact that the findings were made on a motion for dismissal, or for a *directed verdict*, as argued by one of appellants, is of no significance.

(2) On the motion for dismissal, the proctor for Cyanamid argued that the evidence almost conclusively demonstrated that the Chinese crew men died or were injured as a result of the raging fire, on the water and on the RELIANCE. Proctor for the dead and injured seamen, on the other hand, argued that the men died from, or were injured by, the toxic and poisonous effects of the chemical. Cyanamid pointed to the evidence of a young lieutenant of the Coast Guard who testified that he and his men worked right at the hatch where the particular cargo was loaded, and from there fought the fire with no ill effects. A number of the members of the crew of the BEREAN testified that they went forward and fought the fire with no ill effects. The master of the tug boat said that he was in there fighting the fire. Members of the crew of RELIANCE were on the foredeck fighting the fire. Most of the photographs of decedents, with one exception, disclose faces and bodies that were "badly charred."

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21 ". . . **At the close of petitioner's case, the Court afforded all parties an opportunity to introduce evidence bearing on the issue of the liability of American Cyanamid Company; and was advised by all counsel that the claim against American Cyanamid rested solely on the evidence produced by petitioner.** The Court was of the view that petitioner had failed to show a cause of action against American Cyanamid on behalf of UNION RELIANCE, her cargo interests, or others, and dismissed the libels against the respondent." (Emphasis supplied.) (R. 5118.)

The one major exception was the picture of a Chinese second mate, who evidently died in the cabin deck washroom. He was not burned, nor was there anything else observed which pointed to the cause of his death. The photograph in evidence, and the testimony shows, that the pilot Duncan was burned beyond recognition.

In support of his position, proctor for the injured and decedents, called attention to the unburned body of the second mate that was found in the washroom, the body of the oiler-wiper who was found above the main deck and who was not "burned too seriously," and to the testimony of the funeral director that he examined five bodies which were recovered in Galveston Bay, over one week after the casualty. He testified that he did not find burns "to any noticeable degree." These bodies were puffed and swollen to such an extent that examination was difficult. The undertaker thought that the death of each of these men was caused by drowning.

Even the death certificates do not support the theory that death could have been caused by the toxic or poisonous effects of the chemical under observation. Five of the certificates gave the cause of death as "drowning, due to jumping overboard"; five of the certificates gave the cause of death as "suffocation, 2nd & 3rd degree burns," and one certificate gave the cause of death as "septisemia, due to major thermal body burns." Even as to the decedents whose deaths were attributed to drowning, the funeral director conceded that there were burns on the bodies.

In any event, both in the testimony and on the argument, the theory of the Consul General was fully presented to, and explored by, the able trial judge. After analyzing all of the evidence, he found that the deaths and personal

injuries were caused by fire.[22] While this specific finding was not made at the time of ruling on Cyanamid's motion for dismissal, no additional evidence was produced on the subject. For that matter, the final dismissal as to Cyanamid is a part of the main interlocutory decree, from which this appeal is prosecuted. This dismissal, of course, was entered after the entry of the findings and conclusions. Therefore, Cyanamid is entitled to the benefit of each finding on which the decree is based.

If, in fact, it could be said that the judge failed to make a finding on the issue of the cause of death or injuries, nevertheless, the burden of proof on that issue was on the Consul General. Consequently, all facts not embraced in the specific findings should be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens,* 166 F.2d 659 (7th Cir. 1948); *Container Patents Corp. v. Stant,* 143 F.2d 170 (7th Cir. 1944), *cert. denied* 323 U.S. 734. Appellant had a right to seek a specific finding if he so desired.

Any other finding by the judge, on the record before him, would be based on pure speculation and guess work. This is conceded by Dr. Brieger, the principal witness for China Union and its dead and injured crew members, who testified that an autopsy would be required before even an expert could express an opinion on whether any one of

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22 "As a result of the fire caused by the collision, Houston Ship Channel Pilot Duncan and the following crew members of UNION RELIANCE were killed: Lan Jing-Chau, Chen Teh-Yao, Wu Hsing-Rei, Wu Shih-Ming, Pao Fuh-Gen, Huang Ah-Tong, Hu Ah-Wang Ting Chea-Fah, Yuan Sing-Wang, Hsia Lian-Ken, and Koo Kuang-Yan; and the following were injured: Hau Wen-Tsai and Mang Han-Ying. In addition, much of the cargo of the UNION RELIANCE (principally that in the forward holds of the vessel) was lost, as well as the personal effects of the crew." (R. 5130.)

these men died from exposure to acrylonitrile.[28] With the opinion in the record, a trial judge could arrive at no conclusion other than that the Consul General had failed in his burden of showing that death or injury was caused from the toxic effects of the acrylonitrile.

Completely disregarding the effect of the controlling finding that fire was the cause of the deaths and personal injuries, both China Union and the Consul General again point to testimony indicating a practice in the chemical industry to construct cofferdam space around tanks in which dangerous chemicals are to be transported and that one of the purposes of such construction was to prevent the escape of such chemicals in the event of a collision. Other testimony indicates that it was a common practice in the industry to carry dangerous chemicals away from the skin of the ship. Doctor Brieger testified that sufficient bodily contact with acrylonitrile would, in his opinion, cause death by ingestion or by inhalation of its fumes. He, likewise, opined that acrylonitrile was much more poisonous than a five percent dilution of hydrocyanic acid which, by Coast Guard Regulations, was classified, for transportation purposes, as a Class B poison. He thought that the statement in Cyanamid's literature that acrylonitrile produces symptoms "similar to those produced by hydrogen cyanide"

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[28] "An autopsy would show whether the man, in addition to the effect of the fire, has absorbed large quantities of acrylonitrile, which, as I have told, will be converted into cyanide, a very easy affair; it can be shown with a spectrophotometer and otherwise; and if such an autopsy is made, one can state whether this individual had absorbed such quantities of acrylonitrile that they in themselves would have killed this man. **But this can only be done—such a statement can only be made if a proper autopsy has been made, or if the blood is bright red; that's a much simpler method. It would indicate that the man has indeed absorbed very large quantities or large quantities of acrylonitrile, with the consecutive development of cyanide.**" (Emphasis supplied.) (R.2129.)

was incorrect. His thought was that the symptoms were precisely the same, but this is a mere play in words, and not of substance. He also believed that if rat tests had been made by the Coast Guard with the chemical, it probably would have been classified in a Class B category as toxic or poisonous in nature. The judge was not bound to accept and apply these opinions. He was only bound to give to them such weight as he thought they deserved and he was at liberty to entirely reject them if he felt that the reasons given in support thereof were unsound. This rule is applicable to a trial judge, as well as a trial jury. *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628 (1944). Also, the judge had the opportunity to see and hear the witness and pass on his credibility.

Beyond that, the printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error. Of significance, though not controlling, is the fact that the casualty occurred in November, 1961. There was an immediate Coast Guard investigation. The classification of acrylonitrile has been reviewed by the Coast Guard on at least three occasions[24] since the casualty and remains in the same classification. The legal principles applied in *Whorton v. T. A. Loving & Co.*, 344 F.2d 739 (4th Cir. 1965), are sound, but the factual background there discussed is so far removed from ours that such principles

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[24] (1) 46 C.F.R. § 146.21-100, p. 172, § 146.25-200, p. 495-694; (2) 46 C.F.R. § 146.10-100, p. 20, § 146.25-200, p. 220-256; (3) Federal Register, December 24, 1964, Vol. 29, No. 248, pp. 18163-18168.

cannot be here applied. For the purpose of this opinion, we have assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual.

Aside from everything else, it would appear that the proximate cause of death of and injuries to the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed. The remarkably clear pictures in evidence demonstrate that the RELIANCE ruptured the skin of the BEREAN and advanced into the hull to a depth of approximately 14 feet. Obviously, the inside skin of a cofferdam would have been ruptured and such a dam would not have prevented the escape of the chemical. Under the weight of this assault, a cofferdam would have provided no more protection that would a sheet of tissue paper.

b. Dissenting Opinion of Judge Brown.

BROWN, Circuit Judge, concurring in part and dissenting in part:

I concur fully in all of the very excellent opinion prepared for the Court by Judge Kilkenny except as to some portions in the section entitled "Assignment V" as to which I have some reservations and that part entitled "Claim Against Cyanamid" which I believe to be erroneous. As to the latter I dissent. My difference would not change the result as between BEREAN and RELIANCE, between RE-

LIANCE'S Cargo and RELIANCE, between the injured/decedents and RELIANCE and her owners, or the denial of relief as to injured/decedents against BEREAN. It would afford RELIANCE and the injured/deceased victims the right to show that damages and injuries were caused or aggravated by Cyanamid's neglect of its duties. To this extent and for this purpose, I believe the case should be reversed and remanded.

As to "Assignment V.," I accept the proposition that a shipowner is entitled to rely on the classification of the material and the stowage requirements prescribed by the regulatory agency, here the Coast Guard. There may, however, come a time when a carrier acquires so much knowledge about the peculiar characteristics of a particular cargo, which are not generally known, that it can no longer rely solely on the insulation afforded by reading and applying Coast Guard regulations which it knows in fact are either wrong or incomplete. The aim of the regulations, the aim of the law, is to promote safety, especially to the innocent third parties—crew members, longshoremen, persons on other vessels, members of the public, and others—who are likely to be exposed to the hazards of the product in its normal course of distribution, transportation, and handling. That aim is hardly achieved by an absolute which declares that a shipowner may ignore hazards not disclosed by the Regulations, but of which it knows and knows how to minimize by prudence. This is a long way from making every shipowner his own chemist, physicist, physical chemist, or the like in this day of scientific marvels and new esoteric products.

But Cyanamid is in no such favored position. It is the manufacturer and supplier of a chemical that it knows can

and does kill. Cyanamid's awesome obligations in this day of products liability when Acrylonitrile goes to sea is no less than on land. It cannot rely on—and the proof does not even begin remotely to suggest that it ever did, or would, rely on—the Coast Guard. Cyanamid knows that if it—a huge industrial enterprise which proudly claims a preeminence in this chemical field—relied on the Coast Guard with its limited laboratory facilities for its research and development, it would go bankrupt. The Coast Guard might come to it, but it would never, simply never, go to the Coast Guard to ascertain what the characteristics and hazards of its own product are.

So while the law affords to BEREAN the right to accept a faulty Coast Guard classification, Cyanamid can claim no such privilege. Its own published pamphlet entitled "Handling-Storage-Analysis of Acrylonitrile," introduced as an exhibit and to which the Court's opinion refers, makes it clear that it was, as Dr. Brieger testified, no less toxic than a Class B poison since it was more toxic than the test standard 5% dilution of hydrocyanic acid. Dr. Brieger had preeminent qualifications which Cyanamid never challenged—indeed could not challenge.[31] If, as the Court suggests, his testimony was guarded, occasionally hesitant, it was, as the quoted reference to autopsies (see note 23) reveals, just another clear proof of his scientific competence. Time and time again, he made plain, based upon a lifetime study and industrial experience with this very compound, that for seamen to be afloat in water having a film of Acrylonitrile on the surface[32] would mean almost certain

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[31] Dr. Brieger had made tests and reports on Acrylonitrile which were submitted to Cyanamid.

[32] In the collision, No. 1 port wing tank was ruptured. All of the 226 tons of Acrylonitrile spilled out into the channel.

death.[33] And that is what Cyanamid's own pamphlet reflected in vivid terms.[34]

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[33] Ironically the record reveals that about a year after this collision, the Master of BEREAN was killed by Acrylonitrile fumes resulting from a very small leak in the pump room. No one, certainly not Cyanamid, suggests that this post-collision event was an untoward surprise to those knowledgeable about Acrylonitrile.

[34] As to handling the chemical, Cyanamid explains:

> "The precautions set forth in this bulletin are the results of the experience gained in handling and storing Acrylonitrile during this period. It should be emphasized at the outset, that because of the toxic and flammable nature of Acrylonitrile, handling operations should be performed in areas which are properly ventilated and free from sources of ignition."

As to cleaning tanks in which Acrylonitrile has been stored, Cyanamid warns:

> "Protective equipment should be made available to those entering [storage] tanks. This equipment should include cover-alls, eye goggles, and gas masks. * * * The person working in the tank should be provided with a body harness with life line attached. Station a man on the outside end of the life line to do nothing but watch the worker within."

And the type of gas mask required differs with the concentration of the chemical's vapors:

> "Use this type of canister (organic vapor) **only** in locations where Acrylonitrile vapor content is less than 2% and the oxygen concentration is above 16%. Otherwise a mask with self contained oxygen or air supply **must** be employed." [Emphasis in original]

Cyanamid is the last to minimize the effects of the chemical on the human body:

> "Acrylonitrile is toxic by inhalation, by absorption through the skin, and by oral ingestion.
>
> "* * *
>
> "Poisoning by Acrylonitrile produces symptoms which are similar to those produced by hydrogen cyanide. Excessive vapor inhalation causes weakness, headache, sneezing, abdominal pain, and vomiting. Absorption of large amounts of the liquid through the skin produces similar symptoms. * * *."

The question is not whether BEREAN was at fault in loading Acrylonitrile in skin tanks unprotected by cofferdams. The question is whether Cyanamid knowing what it does, could knowingly load BEREAN at Cyanamid's terminal knowing also that the cargo was going into skin tanks. In this respect Cyanamid had duties that transcended those it owed to Andersen or BEREAN and which, the Court supposes, it perhaps satisfied by showing the Master the blue pamphlet. It owed a duty literally to the world—at least

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And in describing the proper methods of waste disposal, the manufacturer warns of the danger to fish:

> "Acrylonitrile stream effluents should be treated to such an extent that they pose no danger to downstream public water supplies or to aquatic life. * * * Although it has been demonstrated that fresh-water fish can tolerate an Acrylonitrile level of 10 p.p.m., the actual tolerable limit will depend on local conditions and use of streams."

And if that "aquatic life" happens to be seamen afloat, who will both absorb and breath vapors, "the currently accepted threshold limit for * * * an eight-hour exposure is 20 parts of vapor per million parts of air," which makes it more toxic than carbon tetra chloride (25 p.p.m.) but only slightly less toxic than hydrogen cyanide (10 p.p.m.) Nevertheless, the chemical is toxic enough so that "the regimen of treatment [by a physician] recommended for Acrylonitrile poisoning is that for cyanide poisoning."

In several places and ways the pamphlet equates Acrylonitrile with Hydrogen Cyanide (Hydrocyanic Acid). This is a Class A poison, § 146.25-5, defined as "poisonous gases or liquids of such nature that a very small amount of gas, or liquid, mixed with air is dangerous to life." As such it is listed with only 13 other poisons, three of which are military poisonous gases. And footnote 1 to Hydrocyanic Acid permits dilute solutions not exceeding 5% strength to be classed as Class B poisons. Class B covers "Poisonous liquids or solids * * * other than Class A, C or D poisons, which are known to be so toxic to man as to afford a hazard to health during transportation." § 146.25-10. Rat and rabbit ingestion, absorption and inhalation test standards are thereafter prescribed. There is no evidence to refute Dr. Brieger's testimony that Acrylonitrile would fail these tests.

that world within the reach and protection of American jurisprudence, land-based, salt water and amphibious. It had to have in mind port workers at the place of loading, crew members on the carrying vessel, crew members on accessorial tugs, owners and crew members of vessels with which the carrying vessel might come in contact by collision or otherwise, port officials, customs inspectors, immigration officers, maritime service personel, and members of the public. The duties owed to this limitless group of protectees require as a minimum that it not knowingly participate in a method of handling or transport which would imprudently imperil the lives of these people. I do not suggest here that Cyanamid, the manufacturer-supplier-shipper, has the liability of an insurer, but it certainly has the far-reaching awesome liabilities now associated with products liability. *Putman v. Erie City Mfg. Co.*, 5 Cir., 1964, 338 F.2d 911, Restatement, Torts §388. When the material is fraught with so much danger, the liabilities may be almost absolute either because the so-called ordinary care of the prudent person itself calls for care which is extraordinary or because of principles of strict liability. Indeed, this teaching of Texas City was not lost to the industrial or judicial world because the Government as the manufacturer of FGAN escaped liability from the peculiar governmental "discretionary function" exemption, *Dalehite v. United States*, 1953, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, . . . . AMC . . . ., or the stringent limitation of the scope of the FTCA to exclude "novel and unprecedented" cases, a reading which was shortly to be repudiated. *Rayonier v. United States*, 1957, 352 U.S. 315, 319, 77 S.Ct. 374, 1 L.Ed.2d 354.

But the trial Judge never really faced up to this issue. Nor does this Court. Rather, each equates Cyanamid's obligations with those the carrying vessel BEREAN owed to

others. As to the BEREAN, the Coast Guard regulations, so long as BEREAN did not know they were faulty, were an adequate insulation. But in relation to members of the public and others, Cyanamid could not fall back on the Coast Guard. The problem was really not whether the Coast Guard classification was in error, as Dr. Brieger tried to demonstrate. Rather, it was what Cyanamid actually knew and ought to have known about its own product and knowing that, what in prudence considering these extremely high hazards could and ought to be done to minimize,[35] if not eliminate, the devastating consequences of a foreseeable casualty.

This was a basic error in approach by the District Judge. And our efforts to overcome the deficiency by questioning the standing of China Union to assert the claim and to hold as a matter of law that there could be no proof of *causation* as to the claims of the injured/deceased will not suffice. We must recall that this case, as are all extensive maritime catastrophes, was being tried in two stages—liability and damages. This is the first time, to my knowledge, for example, in which death certificates, issued generally in Texas by people whose only competence is the lowest office in the judicial hierarchy—prove the cause of death. I agree the issue has not been proved. No more so was the damages sustained by BEREAN or its cargo. That is to come later. As to China Unions' standing, at the liability phase only, who is to say that had the fumes from this lethal cargo not have been freed by rupture of the hull forming the tank sides, the action on RELIANCE might not have been different?

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[35] BEREAN had main tanks 1 through 8 divided by longitudinal bulkheads affording a series of 16 inboard tanks fully separated from the ship's hull by wing tanks on each port and starboard, side.

On this record, the Judge should have held that as against Cyanamid a prima facie case had been made out. Cyanamid should have been put to its proof to refute, if it could, the hazardous characteristics, and on what prudence would require of the manufacturer-supplier-shipper of a product of such deadly potential.[36] The Judge would then have decided whether Cyanamid had the usual land-based products liability of a chemical manufacturer. If he declared in the affirmative, proof of damages, if any—and I do not minimize the if any—would be opened for a second stage on damages.

The admiralty has led, not followed. But here salt water dilutes the responsibility now so plainly resting on the manufacturer-supplier-shipper of a commercially useful, indeed valuable, chemical compound which carries death with its utility.

I would therefore reverse for further hearing as appropriate on the claims of RELIANCE and her owners, and the injured/decedents against Cyanamid.

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[36] Indeed at this point the Coast Guard regulations might turn on Cyanamid to prescribe an absolute standard. Cf. Marshall v. Isthmian Lines, Inc., 5 Cir., 1964, 344 F.2d 131, . . . . AMC . . . . If, as Dr. Brieger so stoutly maintained, the rat tests prescribed by § 146.25-10(1)(2) (see note 34, supra) would bring Acrylonitrile within Class B poisons, then it is undisputed that for a combustible liquid having lethal characteristics and defined as a Class B or Class C poison, such cargo must be carried in tanks which are independent of the ship's hull, separated by cofferdams, etc. 46 C.F.R. § 39.01-1, .05-1. The significance of such tests would not be to establish that classifying Acrylonitrile as inflammable by the Coast Guard was erroneous as such. Rather, since a manufacturer knows what accepted tests would reveal, the significance would be to forbid the manufacturer as shipper to tender it for shipment without disclosing all these characteristics and to knowingly participate in a loading or shipment which, with such knowledge, it knows to be dangerous. Cf. 46 USCA § 170(10).

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NO. 934

IN THE

# Supreme Court of the United States

October Term, 1966

LAN JING-CHAU, ET AL., *Petitioners*

-versus-

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:*

Petitioners Lan Jing-Chau, et al., respectfully move this Honorable Court for a rehearing of its order entered herein on February 20, 1967, denying the petition for writ

of certiorari, and again prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition filed herein January 4, 1967, and would respectfully show that for this there exist intervening circumstances of substantial or controlling effect and other substantial grounds available although not previously presented. Petitioners have studied the motion for rehearing being filed herein by China Union Lines, Ltd., in Cause No. 933, October Term, 1966, and believing the grounds therefor presented under its Second Point are completely sound, in an effort to save the time of this Honorable Court and at the same time comply with its rules relative to motions for rehearing and so to preserve their rights herein, petitioners simply adopt as the grounds for this their motion the Second Point set forth in the motion for rehearing being filed therein in said Cause No. 933, October Term, 1966, as follows:

## GROUND FOR ALLOWING REHEARING AND FOR GRANT OF WRIT OF CERTIORARI

### 1.

### Dismissal (on Demurrer) of Libels Against American Cyanamid Company

The trial Court freed American Cyanamid Company, the manufacturer-shipper of the chemical cargo the Court found toxic and dangerous as well as inflammable, on the ground that the law imposed on it no greater duty toward third persons than to warn the carrier of the dangerous properties of the toxic chemical, which was done.

The Court of Appeals' only reference to this duty of the manufacturer-shipper of the chemicals which the trial Court had clearly found were toxic and dangerous was to say that it

> " . . . assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual",

But it then held American Cyanamid free from liability for the same reasons it affirmed that the carrier had been rightfully exonerated from any liability.

The trial Court upon ample evidence found that the chemical which escaped and here caused the deaths, personal injuries and nearly all of the large property losses was lethally toxic and dangerous to health and that such properties were well known to the manufacturer-shipper and the carrier. Nevertheless both it and the Court of Appeals failed to follow the statute (46 U.S.C. §391a) governing *bulk* shipments on tank vessels as here and the Coast Guard regulations made pursuant to *that statute*, 46 C.F.R. §§39.01-1 and 39.05-1(a) and 146.25-10, which expressly forbade *transportation in bulk* in the wing tanks of *tank vessels* of inflammable liquids known to be toxic. Instead the Court of Appeals erroneously followed the trial Court in applying here the Interstate Commerce Commission classification for inflammables shipped in *containers* on *cargo* vessels (not *bulk* chemicals shipped in tank vessels) adopted pursuant to the provisions of 46 U.S.C. § 170 by the Coast Guard, printed at 46 C.F.R. § 146.21-100.

Since the statutes and regulations made pursuant thereto in clear language impose on all concerned with their

handling the duty toward *everyone* to comply with the regulations for safe transportation of dangerous substances, dissenting Circuit Judge Brown was clearly right in stating neither Court applied the proper standard of care to the duty of American Cyanamid Company.

The decision below is thus squarely contrary to statute.

It is also in direct conflict with the decision of all the judges *en banc* where dangerous products are concerned of the Court of Appeals in *Simpson Timber Co. v. Parks*, 369 F.2d 324, at 328-329, and 331 et seq. (9 Cir. 1966). (The record in that case has now been lodged with the Clerk of this Court, having been forwarded on February 17, 1967, petitioner is informed, and in which petitioner is assured a writ of certiorari will be sought to review the decision of the majority, which freed the product manufacturer from liability where the product was an ordinary object not inherently dangerous as was the chemical here.)

Petitioner respectfully submits that the fact findings of the trial Court have been disregarded, and that the decision below in completely exonerating from liability a manufacturer-shipper of a lethally toxic, inflammable liquid who knowingly permits its bulk transportation in the wing tanks of a tank vessel, which was in direct contravention of the applicable Coast Guard regulations lawfully promulgated pursuant to statute, is clearly erroneous. It is as well with respect to the duty of a manufacturer-shipper of a dangerous product contrary to decisions by other Courts of Appeal. Writ of certiorari should therefore be granted.

# STATUTES AND REGULATIONS INVOLVED

## STATUTES HERE PERTINENT

**46 U.S.C. § 170—Regulation of carriage of explosives or other dangerous articles on vessels—Vessel defined.**

"(1) The word 'vessel' as used in this section . . . shall not include any . . . vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in its own tanks . . ."

* * *

"Transportation, etc., of other explosives or other dangerous articles; exceptions

"(6) (a) It shall be unlawful knowingly to transport . . . except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: . . .

"(b) This subsection shall not apply to—

* * *

"(vi) inflammable or combustible liquid cargo in bulk: Provided, however, That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title."

"Regulations for protection against hazards created by explosives or other dangerous articles.

"(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)- (5) or (6) of this section apply—

"(a) The Commandant of the Coast Guard shall . . . classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of

this section with respect to the descriptive names . . . and certification of such explosives or other dangerous articles . . . and *shall accept and adopt for the purposes above mentioned in this subsection such . . . classifications,* specifications of containers, packing, marking, labeling and certification of explosives or other dangerous articles or substances *to the extent as are or may be established from time to time by the Interstate Commerce Commission* insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water.

**46 U.S.C. § 391(a)—Vessels having on board inflammable or combustible liquid cargo in bulk.**

"(1) Vessels included

"All vessels . . . that shall have on board any inflammable or combustible liquid cargo in bulk . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: . . .

"(2) Rules and regulations for handling liquid cargo

"In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary . . . with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; . . ."

## Coast Guard Regulations Pertinent

**46 C.F.R. § 39.01-1—Scope of regulations—TB/ALL*.**

"(a) The regulations in this part contain requirements for the transportation of inflammable or combustible liquids having lethal characteristics and de-

fined as Class 'B' or 'C' poisons in §§ 146.25-10 . . . of this chapter. . . ."

(*TB/ALL by definition, 46 C.F.R. § 30.01-5(c) means tank ships and barges plying all waters.)

**46 C.F.R. § 39.05-1—Design, construction, and arrangement—TB/ALL.**

"(a) Cargo having a Reid vapor pressure not exceeding 14 pounds per square inch *may be transported* . . . in tanks built integral with the vessel's hull and *completely separated from the shell of the vessel by means of wing tanks,* cofferdams, double bottoms or similar voids."

**46 C.F.R. § 146.01-1—Purpose of regulations.**

"The purpose of the regulations in this subchapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States . . ."

**46 C.F.R. § 146.02-5—Compliance.**

"The applicable provisions of the regulations in this part shall be observed by:

(a) All vessels, domestic or foreign, subject to the regulations in this part, and the owners, charterers, agents, masters or persons in charge of such vessels;

* * *

"(c) All shippers, their agents or other persons offering explosives or other dangerous articles or substances and combustible liquids for transportation on board vessels;"

**46 C.F.R. § 146.25-10—Less dangerous poisons, Class B, liquids and solids, poison label.**

"(a) Poisonous liquids or solids (including pastes and semi-solids), other than Class A, C, or D poisons,

which *are known to be so toxic to man as to afford a hazard to health during transportation,* or which, in the absence of adequate data on human toxicity, are presumed to be toxic to man because they fall within any one of the following categories when tested on laboratory animals: . . .

## CONCISE AMPLIFICATION OF GROUND FOR ALLOWING REHEARING AND GRANT OF THE WRIT

### POINT

**Dismissal (on Demurrer) of Libels Against American Cyanamid Company**

### STATEMENT

After petitioner and the other libellants against American Cyanamid Company had rested their case in chief, American Cyanamid Company demurred and on demurrer the trial Court dismissed the libels. R. 3454-3455. In so doing it stated that the law imposed on the manufacturer and shipper (here of course American Cyanamid Company) of an "inherently dangerous commodity" "the duty to warn and advise others . . . of its dangerous propensities." It went on to find "the evidence shows clearly that that was done, and that the carrier was fully advised of the dangerous characteristics of the cargo". And the libels were accordingly dismissed.

In the trial Court's decision, after finding that the BEREAN loaded tons of acrylonitrile in the three No. 1 tanks, of which of course one was the No. 1 port tank, it found

> "11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. . . ."

The Court then referred to the chemical's Coast Guard classification in 46 C.F.R. § 146.21-100 as an inflammable liquid and not as a poison. (R. 5124.)

By its next two Fact Findings the trial Court found that while the collision was not severe the No. 1 port tank of the BEREAN was breached, "causing its acrylonitrile cargo to become ignited and explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited", and as a consequence eleven persons were killed, others injured, and the UNION RELIANCE lost, along with much of her cargo. (R. 5130.)

The trial Court then found that the place of carrying the cargo violated no Coast Guard regulations nor was it negligence. R. 5136-5137. No reference was made to the statute (46 U.S.C. §391a) which requires all concerned with placing dangerous substances *in tank vessels* in waterborne commerce to comply with applicable Coast Guard regulations, nor those regulations, 46 C.F.R. §§ 39.01-1 and 39.05-1, which require carriage of such dangerous cargoes in tanks "completely separated from the shell of the vessel by means of wing tanks".

The Court of Appeals affirmed the decision of the trial Court as one lawfully based upon substantial evidence. It made only a passing reference to the duty of a manufacturer-shipper of dangerous products, saying that liability

was "assumed had there been a breach of duty, tortious or contractual".

Dissenting Circuit Judge Brown, however, held that certainly a prima facie case of liability had been made out against American Cyanamid Company and stated that neither Court had "faced up" to the law governing the manufacturer-shipper of dangerous commodities well known by it to be dangerous.

The ultimate decision in *Simpson Timber Co. v. Parks, supra,* will have a direct bearing on the law in this case; as it now stands, the two decisions are of course in direct conflict.

## ARGUMENT

Petitioner respectfully submits that the trial Court here, upon a great deal of ample evidence, has found that the chemical cargo in addition to being inflammable and explosive was "highly toxic, and gives off poisonous and dangerous fumes" which can cause illness and death. It is so specifically found in paragraph 11 of the Fact Findings, R. 5124, and likewise found when the libels against the manufacturer-shipper were dismissed. It further found that both American Cyanamid Company and the carrier had knowledge of these dangerous properties. R. 3454-3455, as above stated.

Such findings therefore bring the chemical and all concerned with its handling in tank vessels in water-borne commerce within the purview of the statute regulating such vessels carrying *inflammables in bulk,* 46 U.S.C. § 391a, and duties imposed upon such persons by Coast Guard regulations made under the authority of that statute (46 U.S.C. § 391(a)(2)), namely those set forth in 46 C.F.R. § 39.01-1, 46 C.F.R. § 39.05-1, and 46 C.F.R. § 146.25-10:

The first such regulation, 46 C.F.R. § 39.01-1, states that the regulations contain requirements for transportation of "inflammable or combustible liquids having lethal characteristics" and defined as Class "B" or "C" poisons in § 146.25-10 . . . of this chapter. The second such regulation, 46 C.F.R. § 39.05-1, prohibited carriage of such a liquid in a wing tank, as it was here carried. And the third such regulation, 46 C.F.R. § 146.25-10, defined the inflammable liquid having lethal characteristics the carriage of which in tank vessels was being so regulated as

> "Poisonous liquids . . . which *are known to be so toxic to man as to afford a hazard to health during transportation* . . ."

The trial Court having so expressly found on ample evidence that the chemical here was lethally toxic, and thus afforded a hazard to health in transportation, the statutory and regulatory purposes of the regulations to protect the public by compelling transportation as directed by the regulations were here clearly breached, and American Cyanamid was erroneously relieved from liability.

The Courts below are in obvious error in relying so heavily on the classification of the chemical by the Coast Guard only as an inflammable liquid in 46 C.F.R. § 146.21-100. Under the provisions of the statute *governing article shipments on vessels other than tank vessels;* 46 U.S.C. § 170(7)(a), the Commandant of the Coast Guard is *required* for such *article* shipments to accept the Interstate Commerce Classification, the statute providing

> ". . . the Commandant of the Coast Guard . . . shall accept and adopt for the purposes . . . of this subsection such . . . classification . . . of explosives or other dangerous substances . . . as are or may be

established from time to time by the Interstate Commerce Commission . . ."

The Commandant so interprets his obligation under this statute: Proceedings of the Merchant Marine Council, United States Coast Guard, Vol. 24, No. 2, February, 1967, page 32, which sets forth in inviting attendance at a hearing on proposed changes in regulations, including Dangerous Cargo Regulations,

> ". . . R.S. 4472, as amended (46 U.S.C. 170), requires that the Coast Guard accept and adopt such . . . classifications . . . of containers, packing . . . and certification of explosives or other dangerous substances . . . as are or may be established . . . by the Interstate Commerce Commission. . ."

This was a shipment *in bulk,* aboard a *tank vessel* and not an article carried aboard a *cargo* vessel, for which the classification at 46 C.F.R. § 146.21-100 shows that classification is intended. The statute, 46 U.S.C. § 170(6)(a)(vi), plainly states handling *in bulk* "shall be subject to the provisions of section 391a of this title", under the authority of which as shown the Coast Guard forbids shipment of liquid poisonous inflammables known to be toxic to man in wing tanks.

The chemicals here were found by the trial Court lethally toxic, inflammable, and explosive on ample evidence. Under the provisions of 46 U.S.C. § 391a and the authorized Coast Guard regulations 46 C.F.R. §§ 146.01-1 and 146.02-5 it was the statutory duty of American Cyanamid Company (as well as of the BEREAN) to comply with the requirement that this cargo be carried in tanks protected by wing tanks. The trial Court has expressly found that the collision breached only the wing tank, and it has thus found that

the great deaths and losses here directly resulted from breach of the applicable statutory regulations.

The Court of Appeals was therefore in clear error in holding otherwise, and dissenting Circuit Judge Brown clearly correct in stating both Courts failed to apply the lawful standard of care in this case.

## PRAYER

Petitioner prays that its motion for rehearing of its petition for issuance of writ of certiorari be granted, and that thereafter the writ issue, restricted if the Court should so determine proper to the issues herein set forth but if permissible under the rules on all grounds heretofore set forth in the petition.

Respectfully submitted,

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## CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered February 20, 1967, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

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